UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EVELYNE SUZANNE SUDRE, et al., Plaintiff, v. THE PORT OF SEATTLE, et al., Defendant.	CASE NO. C15-0928JLR ORDER

I. INTRODUCTION

Before the court are five motions: (1) Defendants The Port of Seattle ("the Port") and ABM Industries's ("ABM") (collectively, "Defendants") motion for summary judgment (MSJ (Dkt. # 31)); (2) Defendants' motion for relief from the court's case scheduling order and for leave to amend their answers (MTA (Dkt. # 46)); (3) Defendants' motion to exclude the testimony of Plaintiffs Evelyne Suzanne Sudre and Michel Sudre's (collectively, "Plaintiffs") expert witness William Martin (Pls.' MTE

(Dkt. # 33)); (4) Plaintiffs' motion to exclude portions of the testimony of Defendants' expert witness Alan Black (Defs.' MTE (Dkt. # 35)); and (5) Plaintiffs' motion for sanctions against Defendants for spoliation of evidence (MFS (Dkt. # 36)). The court has considered the motions, the parties' responses, the parties' replies, the relevant portions of the record, and the applicable law. Being fully advised,[1] the court DENIES Defendants' motion for summary judgment; GRANTS Defendants' motion for relief from the court's case scheduling order and for leave to amend their answers subject to further instruction as set forth below; GRANTS in part and DENIES in part Defendants' motion to exclude the testimony of William Martin; GRANTS Plaintiffs' motion to exclude portions of the testimony of Alan Black; and DENIES Plaintiffs' motion for sanctions for spoliation of evidence.

II. BACKGROUND

A. The Complaint

This case arises from Ms. Sudre's alleged slip and fall at SeaTac International Airport ("STIA") on September 22, 2014. (*See* Compl. (Dkt. # 1) ¶ 3.1.) The Port operates STIA (*id.* ¶ 1.3; *see also* Port Answer (Dkt. # 12) ¶ 1.3), and ABM is a contractor for the Port and provides janitorial services at STIA (Compl. ¶ 1.4; *see also* ABM Answer (Dkt. # 11) ¶ 1.4; MSJ at 2.) Ms. Sudre was traveling with her husband, Michel Sudre, and her sister on their way back to France from a vacation in the United

[1] Neither party requested oral argument on any of the motions, and the court determines that oral argument would not be helpful to its disposition of the motions. *See* Local Rules W.D. Wash. LCR 7(b)(4) ("Unless otherwise ordered by the court, all motions will be decided by the court without oral argument.").

States. (Compl. ¶ 3.1.) Ms. Sudre alleges that as she headed "for the departure gate for her flight to Paris, France, she slipped and fell on the wet and slippery floor of the departure lounge." (*Id.* ¶ 3.2.) She alleges that "[t]he floor was wet and in a dangerous state" (*id.* ¶ 3.3), and contends that at the time of her fall, "the floor was being cleaned by employees of defendant ABM" and "[w]holly inadequate warnings were given as to the dangerous condition of the floor" (*id.* ¶ 3.4). As a result of the fall, Ms. Sudre "suffered a serious fracture to the neck of her right femur" and "was hospitalized upon returning to France" where she "underwent surgery." (*Id.* ¶ 3.5.) Ms. Sudre alleges that she "has been permanently damaged" by the fall. (*Id.*) Ms. Sudre asserts that she was not contributorily negligent because she "exercised all due care at all times." (*Id.* ¶ 3.7.) Ms. Sudre further alleges that Defendants "were on notice, both actual and constructive, of the dangerous condition but did nothing to remedy it." (*Id.* ¶ 3.8.)

Ms. Sudre brings one claim of negligence against Defendants for her fall. (*Id.* ¶¶ 4.1-4.4.) Ms. Sudre claims damages for her injuries, as well as for "emotional upset, distress and hurt, financial and medical expenses, and . . . a loss of earnings." (*Id.* ¶ 4.2.) Ms. Sudre alleges that "the accident has severely impacted her ability to walk and practice sport." (*Id.* ¶ 4.3.) Mr. Sudre asserts loss of consortium due to Ms. Sudre's injury. (*Id.* ¶ 4.5.)

B. The Events Surrounding Ms. Sudre's Fall

On their motion for summary judgment, Defendants contend that the evidence in this case establishes three possible locations where Ms. Sudre fell based on Ms. Sudre's testimony, Mr. Sudre's testimony, and STIA and ABM employees' testimony, and

therefore three possible versions of events. (*See* MSJ at 2 (illustrating three possible locations of Ms. Sudre's fall).) In response, Plaintiffs point to additional facts surrounding Ms. Sudre's fall.[2] (*See* MSJ Resp. (Dkt. # 67) at 5-8.)

1. Ms. Sudre's Version of Events

Under Ms. Sudre's version of events, Ms. Sudre stepped onto a moving walkway at STIA's Concourse A and saw a yellow cone when she came to the end of the walkway. (Northcraft Decl. ISO MSJ (Dkt. # 32) ¶ 1, pp. 3-23 ("E. Sudre Dep.") at 7:14-20, 8:2-6.) Ms. Sudre testified that the yellow cone was about one meter tall, to the right of the moving walkway, and about 10 meters from the end of the walkway. (*Id.* at 8:7-13, 9:1-13.) Ms. Sudre then testified that she exited the moving walkway, walked about 10 meters and then began to walk around the cone on the right side. (*Id.* at 10:18-11:19.) She testified that she walked about 10 meters past the cone and that once it was about five or six meters behind her, she slipped and fell. (*Id.* at 13:12-14:19.) Ms. Sudre estimates that she fell about 10 meters from the cone. (*Id.* at 13:14-20.)

Ms. Sudre further testified that she did not see any water or moisture on the floor when she fell, but that a maintenance worker wiped off Ms. Sudre's shoes. (*Id.* at 13:5-11, 21:14-19, 15:15-17, 16:13-23.) Ms. Sudre believed the soles of her shoes must have been wet because the maintenance worker wiped them off, but she did not see for herself whether the soles were wet. (*Id.* at 17:5-9, 21:20-24, 22:13-17.) Ms. Sudre saw the paper that the maintenance worker used to wipe her soles (*id.* at 16:24-18:9), and

[2] Plaintiffs also challenge ABM employee Hector Aguilar's version of events based on his deposition corrections, which the court discusses *infra* § III.A.3.

stated that "the paper towel was wet" (*id.* at 18:12-16; *see also* Capp Decl. in. Opp. to MSJ (Dkt. # 69) ¶ 3 (citing E. Sudre. Dep. at 34:16-18 ("I did see that the paper that he had in his hand was humid, so when he wiped my shoes there was something."), 141:16-17 ("[T]he man who came to wipe my shoes, I could see that the towel in his hand got wet.")).)

2. Mr. Sudre's Version of Events

Mr. Sudre testified that Ms. Sudre exited the moving walkway, walked about three to four meters to the right of the cone, and fell. (Northcraft Decl. ISO MSJ ¶ 2, pp. 24-45 ("M. Sudre Dep.") at 30:13-21.) He testified that when she fell, Ms. Sudre was even with the cone or slightly ahead of it. (*Id.* at 44:25-45:4.) He also testified that when Ms. Sudre fell, he noticed moisture on the floor. (*Id.* at 32:15-20, 33:12-19, 37:23-38:15, 38:20-39:3.) Mr. Sudre further testified that the moisture "was comparable to when moisture has just been cleaned up with either a mop or rag." (*Id.* at 34:23-35:3.) Mr. Sudre stated that he did not "see any puddles, any spills, or any droplets." (MSJ at 5 (citing M. Sudre Dep. at 35:9-13).) Mr. Sudre also testified that someone wiped off the soles of Ms. Sudre's shoes and that he did not see the soles of her shoes. (M. Sudre Dep. at 40:19-41:3, 42:20-23.)

Mr. Sudre also testified that he observed that the wet area where Ms. Sudre fell was approximately one meter by one meter. (MSJ Resp. at 5; M. Sudre Dep. at 31:19-23, 32:17-19 (The area was "wet around my wife, around her shoes."); M. Sudre. Decl. (Dkt. # 38) ¶¶ 11-12.) Mr. Sudre also stated that the janitorial employee who wiped Ms.

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Sudre's shoes after her fall said "sorry, sorry, sorry" as he did so. (MSJ Resp. at 5, 11, 12; M. Sudre Dep. at 37:5-11; Sudre Decl. ¶¶ 14-15.)

3. Defendants' Version of Events

At the time of Ms. Sudre's fall, ABM's janitorial employee Hector Aguilar patrolled and cleaned the concourse areas as part of his duties. (Northcraft Decl. ISO MSJ ¶ 4, pp.62-70 ("Aguilar Dep.") at 66.) Shortly before Ms. Sudre's fall, Mr. Aguilar had found a spill in Concourse A, which he testified looked like a mocha or chocolate coffee. (*Id.* at 68.) Mr. Aguilar testified that the spill was small (*id.*), and that "[h]e cleaned it up the same way he normally cleaned spills" (MSJ at 6 (citing Aguilar Dep. at 68)). Mr. Aguilar put his cart by the spill, mopped the liquid, placed a sign over the spill, and waited by the sign for the area to dry. (Aguilar Dep. at 68-69.) Mr. Aguilar testified that he recalled seeing Ms. Sudre while she was on the moving walkway, but did not notice her again until after her fall. (*Id.* at 69.) He further testified that he thought Ms. Sudre kicked the wet floor sign when she fell because the sign moved from where he had placed it and he had to put it back in place after her fall. (*Id.*)

After Mr. Aguilar had cleaned the spill but before Ms. Sudre fell, Port of Seattle employee Patrick Lisk was speaking with Mr. Aguilar at the site of the spill Mr. Aguilar had cleaned. (Aguilar Dep. at 69; Northcraft Decl. ISO MSJ ¶ 3, pp. 46-61 ("Lisk Dep.") at 48:4-49:5.) Mr. Lisk testified that he saw Mr. Aguilar standing with his cart, but did not know that Mr. Aguilar had just cleaned up a spill and did not see the wet floor sign because the cart obscured it. (Lisk Dep. at 49:20-22, 48:21-49:5, 49:12-19, 50:12-22.) Mr. Lisk states that he noticed Ms. Sudre on the moving walkway, but did not see her

again until after she fell. (*Id.* at 55:22-56:13, 57:25-58:3.) Mr. Lisk testified that Ms. Sudre landed within three to four feet of him when she fell. (*Id.* at 51:15-21.) Mr. Lisk further testified that he did not see how Mr. Aguilar responded to Ms. Sudre's fall and did not see whether the wet floor sign was kicked across the floor. (*Id.* at 54:11-20, 60:22-61:10.)

III. ANALYSIS

A. Evidentiary Challenges

As an initial matter, the parties argue that the court should strike several pieces of evidence in support of their respective motions. Specifically, Plaintiffs argue that (1) Defendants' counsel's declarations in support of their motions are not made on personal knowledge; (2) the deposition excerpts Defendants submitted have not been properly authenticated; and (3) Mr. Aguilar lacked personal knowledge for his deposition corrections and made corrections that constitute sham testimony.[3] (MSJ Resp. at 2-3; MFS Reply (Dkt. # 65) at 5; Defs.' MTE Resp. (Dkt. # 60) at 2.) For their part, Defendants argue that the court should strike (1) the "sorry" statement that a purported employee of Defendants made when he wiped off Ms. Sudre's shoes as inadmissible hearsay, and (2) Mr. Sudre's testimony that "it looked like [the floor] had just been cleaned up in a bathroom with a rag/mop" as inadmissible lay testimony. (MSJ Reply (Dkt. # 71) at 6, 9). The court addresses each of these evidentiary objections in turn.

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[3] The court addresses Plaintiffs' assertions that Defendants' medical expert Christopher Boone's second and third declarations constitute sham testimony *infra* § III.C.2.b.

1. Mr. Northcraft's and Ms. Markette's Declarations

"An attorney may submit a declaration as evidence to a motion for summary judgment." *Clark v. Cty. of Tulare*, 755 F. Supp. 2d 1075, 1083 (E.D. Cal. 2010). "Federal Rule of Civil Procedure 56(e) requires that affidavits [and declarations] submitted in support of a motion for summary judgment . . . (1) be made on the personal knowledge of an affiant who is competent to testify to the matters stated therein, [and] (2) . . . state facts that would be admissible in evidence . . . ." *Boyd v. City of Oakland*, 458 F. Supp. 2d 1015, 1023 (N.D. Cal. 2006). Although "[a] declarant's mere assertions that he or she possesses personal knowledge and competency to testify are not sufficient," *id.*,"[p]ersonal knowledge may be inferred from the affiant's position," *Bellah v. Am. Airlines Inc.*, 623 F. Supp. 2d 1183, 1186 (E.D. Cal. 2009). "Declarations by attorneys are sufficient only if the facts stated are matters of which the attorney has knowledge, such as matters occurring during the course of the lawsuit, [like the] authenticity of a deposition transcript." *Tulare*, 755 F. Supp. 2d at 1084.

In their declarations, Mr. Northcraft and Ms. Markette state that they are attorneys for Defendants and are "familiar" with this lawsuit. (*See* Northcraft Decl. ISO MSJ at 1; Northcraft Decl. in Opp. to MFS (Dkt. # 59) at 1; Markette Decl. ISO MTA (Dkt. # 47) at 1; Markette Decl. ISO Defs.' MTE (Dkt. # 57) at 1.) In addition, Mr. Northcraft and Ms. Martkette testify in their declarations to matters related to this litigation—the authenticity of deposition excerpts (Northcraft Decl. ISO MSJ ¶¶ 1-4), the authenticity of the parties' written discovery responses (Northcraft Decl. in Opp. to MFS at 1-2), and the timeline of the parties' discovery, various communications between counsel, and the

supplementation of Defendants' expert's reports (Markette Decl. ISO MTA at 2-5; Markette Decl. ISO Defs.' MTE ¶¶ 1-8). Here, Mr. Northcraft's and Ms. Markette's personal knowledge "may be inferred from [their] position[s]" as Defendants' attorneys in this matter. *Bellah*, 623 F. Supp. 2d at 1186; *see also Tulare*, 755 F. Supp. 2d at 1084. Accordingly, the court concludes that Mr. Northcraft and Ms. Markette have personal knowledge of the matters to which they attest in their declarations.

2. Deposition Excerpts

"A deposition or an extract therefrom is authenticated in a motion for summary judgment when it identifies the names of the deponent and the action and includes the reporter's certification that the deposition is a true record of the testimony of the deponent." *Orr v. Bank of Am., NT& SA*, 285 F.3d 764, 774 (9th Cir. 2002); *see also Boyd*, 458 F. Supp. 2d at 1023 ("[I]f the affidavit refers to any document or item, a sworn or certified copy of that document or item must be attached to the affidavit."). Plaintiffs argue that none of the deposition excerpts that Defendants provided the court in connection with their motion for summary judgment "are accompanied by the court reporter's certification and are thus inadmissible." (MSJ Resp. at 2.) Defendants agree that they should have filed certification pages with their deposition excerpts and subsequently filed the proper certification pages with Defendants' reply brief. (MSJ Reply at 9; *see also* Northcraft Decl. ISO MSJ Reply (Dkt. # 72) ¶¶ 1-4.) Accordingly, the court declines to strike the deposition excerpts because they have now been properly authenticated. *See Orr*, 285 F.3d at 774.

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3. Mr. Aguilar's Deposition Corrections

A person may make corrections to his deposition testimony "30 days after being notified by the officer the [deposition] transcript . . . is available." Fed. R. Civ. P. 30(e)(1). "[I]f there are changes in form or substance," the deponent must "sign a statement listing the changes and the reasons for making them." Fed. R. Civ. P. 30(e)(1)(B).

Under Ninth Circuit law, a party cannot create an issue of fact by correcting his prior deposition testimony. *See Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009); *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.*, 397 F.3d 1217, 1225 (9th Cir. 2005) (holding that deposition corrections under Federal Rule of Evidence 30(e) cannot be used to create an issue of fact by contradicting prior deposition testimony). This sham deposition correction rule is applied sparingly, however, "because it is in tension with the principle that the court is not to make credibility determinations when granting or denying summary judgment." *Yeager v. Bowlin*, 693 F. 3d 1076, 1080 (9th Cir. 2012). The court must make a finding of fact that a contradiction is actually a sham, and any inconsistency between the deposition testimony and the subsequent corrections "must be clear and unambiguous to justify striking" the corrections. *Van Asdale*, 577 F.3d at 998-99. Although "a district court may find a declaration to be a sham when it contains facts that the affiant previously testified he could not remember," the Ninth Circuit "caution[s] that newly-remembered facts, or new facts, accompanied by a reasonable explanation, should not ordinarily lead to the striking of a declaration [or deposition correction] as a sham." *Yeager*, 693 F.3d at 1080-81. "When determining

whether deposition corrections are a 'sham' or otherwise intended to create an issue of fact for summary judgment, the timing of the deposition changes is informative." *Updike v. Clackamas Cty.*, No. 3:15-cv-00723-SI, 2016 WL 680536, at *1 (D. Or. Feb. 19, 2016) (citing *Hambleton*, 397 F.3d at 1225, in which the Ninth Circuit noted that deposition corrections made after a pending motion for summary judgment were "seemingly tactical").

Mr. Aguilar made several corrections to his deposition testimony, many of which clarify or correct his earlier testimony. (*See* Aguilar Dep. at 66-70.) Some of Mr. Aguilar's corrections, however, provide facts that Mr. Aguilar stated he could not remember during his deposition. (*See id.* at 68-69.) Of particular note, Mr. Aguilar testified during his deposition that he could not remember Ms. Sudre's fall (*see id.* at 38:1-39:10, 40:16-43:8), but his corrected testimony states that he remembers her fall and provides additional details about the fall (*id.* at 68-69). Despite this inconsistency, the court finds that Mr. Aguilar provides reasonable explanations for the "newly remembered facts." *See Yeager*, 693 F.3d at 1081; *see also id.* at 1080 (holding declaration was a sham where the plaintiff "provided no reason for his sudden ability to recall specific facts").

Mr. Aguilar explains that he did not understand and was confused about what the attorney conducting the deposition asked him (*id.* at 66-69) and that there were interpretation or transcription mistakes (*id.* at 68). These explanations appear reasonable, particularly given that Mr. Aguilar is 72 and relied on an interpreter during his deposition. (*See id.* at 7:9, 10-13.) In addition, the deposition transcript reveals

confusion at times between Mr. Aguilar, the attorney conducting the deposition, and the interpreter. (*See, e.g.*, Aguilar Dep. at 8:2-5, 10:19-11, 12:4-6, 14:14-18; MSJ Resp. at 4.) Further, Mr. Aguilar corrected his transcript on May 18, 2016, shortly after his April 7, 2016, deposition[4] (*see* Aguilar Dep. at 66), which casts doubt on Plaintiffs' contention that Mr. Aguilar corrected his testimony solely to create a dispute of fact for summary judgment (*see* MSJ Resp. at 4-5; MSJ (filed on October 11, 2016)); *Updike*, 2016 WL 680536, at *1. The court, therefore, will not strike Mr. Aguilar's deposition corrections. However, Mr. Aguilar's testimony as a whole consists of "the original deposition transcript as supplemented" by the corrections, and Plaintiffs may show any factfinder for impeachment or other proper purposes that Mr. Aguilar made these additions after Mr. Aguilar's deposition had concluded. *See Updike*, 2016 WL 680536, at *2.

Further, the court may infer personal knowledge from Mr. Aguilar's position. *See Bellah*, 623 F. Supp. 2d at 1186. Given Mr. Aguilar's employment with ABM and work at STIA, including that he worked as a janitor in Concourse A at the time of Ms. Sudre's fall (Aguilar Dep. at 7:17-19, 66), the court concludes that Mr. Aguilar's deposition corrections were made on personal knowledge.

4. The "Sorry" Statement

Federal Rule of Evidence 401 states that "[e]vidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence" and

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[4] A person may make corrections to his deposition transcript "30 days after being notified by the officer the [deposition] transcript . . . is available." Fed. R. Civ. P. 30(e)(1). Here, there is no indication that Mr. Aguilar made his corrections more than 30 days after the officer notified him that the transcript was available. (*See* MSJ Resp.)

"the fact is of consequence in determining the action." Fed. R. Evid. 401(a)-(b). Hearsay is an out-of-court statement that "a party offers into evidence to prove the truth of the matter asserted in the statement," Fed. R. Evid. 801(c), and is generally inadmissible, *see* Fed. R. Evid. 802. Under Rule 801(d)(2)(D), hearsay evidence is nevertheless admissible if "[t]he statement is offered against an opposing party" and "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(D).

Defendants argue that the apology Plaintiffs contend Mr. Aguilar made after Ms. Sudre's fall is not relevant under Federal Rule of Evidence 401 because the "statement can easily have more than one meaning." (MSJ Reply at 10); Fed. R. Evid. 401. Defendants also argue that the statement is hearsay because Plaintiffs "appear to be offering [it] as evidence" that the person who said it "was somehow asserting fault." (MSJ Reply at 9-10). They contend that "[a]ssuming the 'sorry' statement was actually made, the person saying 'sorry' undoubtedly intended to assert something thereby." (*Id.* at 10.) Defendants also contend that "the person saying 'sorry' cannot be identified as the Defendants' agent or employee." (*Id.*); *see also* Fed. R. Evid. 801(d)(2)(D) (stating exception to the rule against hearsay for statements made by a party's agent).

The court declines to rule on the admissibility of the statement at this time. The court does not have sufficient context about who made the statement to determine whether it is relevant or whether the statement is admissible under Federal Rule of Evidence 801(d)(2)(D) if the statement indeed constitutes hearsay. The court will therefore address the admissibility of the statement in ruling on the parties' motions in

limine. (*See* Defs.' MIL (Dkt. # 74) at 7-8 (seeking to exclude this statement from the evidence offered at trial.)

5. Mr. Sudre's Testimony

"[T]estimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of [Federal Rule of Evidence] 702." Fed. R. Evid. 701. "In presenting lay opinions, the personal knowledge requirement may be met if the witness can demonstrate firsthand knowledge or observation." *United States v. Lopez*, 762 F.3d 852, 864 (9th Cir. 2014). An opinion is rationally based on the witness's perception when "the opinion is one that a normal person would form on the basis of the observed facts." *Cal. Found. for Indep. Living Ctrs. v. Cty. of Sacramento*, 142 F. Supp. 3d 1035, 1045 (E.D. Cal. 2015); *see also United States v. Beck*, 418 F.3d 1008, 1015 (9th Cir. 2015) ("We hold that a lay witness's testimony is rationally based within the meaning of Rule 701 where it is based upon personal observation and recollection of concrete facts." (internal quotation marks omitted)). "Courts have found lay witness testimony unhelpful and thus inadmissible if it is mere speculation, an opinion of law, or if it usurps the jury's function." *Cal. Found. for Indep. Living Ctrs.*, 142 F. Supp. 3d at 1045. "The admission of lay opinion testimony is 'within the broad discretion of the trial judge [and] not to be disturbed unless it is manifestly erroneous.'" *United States v. Simas*, 937 F.2d 459, 464 (9th Cir. 1991) (quoting *United States v. Fleishman*, 684 F.2d 1329, 1335 (9th Cir. 1982)) (alteration in original).

Mr. Sudre's testimony that the moisture on the floor looked to him like "it had just been cleaned up in a bathroom with a rag/mop" (MSJ Reply at 6) is admissible because his opinion "is rationally based on [his] perception" at the time Ms. Sudre fell, Fed. R. Evid. 701.[5] His testimony as to what the floor looked like is not mere speculation as Defendants contend. (MSJ Reply at 6 ("Although Mr. Sudre can testify as to what [the moisture he observed] looked like," he cannot conclude "that it looked like it had just been cleaned up in a bathroom with a rag/mop.").) Rather, it amounts to "an opinion that a normal person would form on the basis of the observed facts." *Cal. Found. for Indep. Living Ctrs.*, 142 F. Supp. 3d at 1045. Mr. Sudre simply testified regarding the appearance of the floor and the moisture on it when he knelt to assist Ms. Sudre. Accordingly, Mr. Sudre's testimony is based on his observation and recollection of the facts surrounding Ms. Sudre's fall. *See Beck*, 418 F.3d at 1015. In addition, this testimony is "helpful to determining" whether an unsafe condition existed and caused Ms. Sudre to fall and is not based on scientific, technical, or other specialized knowledge. *See* Fed. R. Evid. 701.

B. Motion for Summary Judgment

1. Legal Standard

Summary judgment is appropriate if the evidence shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

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[5] The court notes that Defendants rely on Mr. Sudre's testimony in their motion for summary judgment. (MSJ at 5 (Mr. Sudre "said the humidity was comparable to when moisture has just been cleaned up with either a mop or rag." (citing M. Sudre Dep. at 34:23-35:3)).)

Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). A fact is "material" if it might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "'genuine' only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party." *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001) (citing *Anderson*, 477 U.S. at 248-49).

The moving party bears the initial burden of showing there is no genuine dispute of material fact and that the movant is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party does not bear the ultimate burden of persuasion at trial, it can show the absence of a dispute of material fact in two ways: (1) by producing evidence negating an essential element of the nonmoving party's case, or (2) by showing that the nonmoving party lacks evidence of an essential element of its claim or defense. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party will bear the ultimate burden of persuasion at trial, it must establish a prima facie showing in support of its position on that issue. *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1471 (9th Cir. 1994). That is, the moving party must present evidence that, if uncontroverted at trial, would entitle it to prevail on that issue. *Id*. at 1473. If the moving party meets its burden of production, the burden then shifts to the nonmoving party to identify specific facts from which a fact finder could reasonably find in the nonmoving party's favor. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 252.

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The court is "required to view the facts and draw reasonable inferences in the light most favorable to the [non-moving] party." *Scott v. Harris*, 550 U.S. 372, 378 (2007). The court may not weigh evidence or make credibility determinations in analyzing a motion for summary judgment because these responsibilities are "jury functions, not those of a judge." *Anderson*, 477 U.S. at 249-50. Nevertheless, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Scott*, 550 U.S. at 380 (internal quotation marks omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). Accordingly, "mere allegation and speculation do not create a factual dispute for purposes of summary judgment," *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081-81 (9th Cir. 1996), and "[a] trial court can only consider admissible evidence in ruling on a motion for summary judgment," *Orr*, 285 F.3d at 773.

2. Motion for Summary Judgment

a. Negligence by a Possessor of Land on a Premises Liability Theory

Defendants assert that Plaintiffs have insufficient evidence to prove their claim of negligence on a premises liability theory. (MSJ at 11-13; *see also generally* Compl. (asserting claim of negligence on a premises liability theory).) A cause of action for negligence under Washington law requires the plaintiff to establish "(1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury." *Pedroza*, 677 P.2d at 168. According to premises liability theory, a landowner or possessor of land owes an individual a duty of care based

on the individual's status—invitee, licensee, or trespasser—upon the land. *Curtis v. Lein*, 239 P.3d 1078, 1081 (Wash. 2010). "The threshold determination of whether a duty exists is a question of law." *Degel v. Majestic Mobile Manor, Inc.*, 914 P.2d 728, 731 (Wash. 1996). The parties do not dispute that Ms. Sudre was the Port's business invitee at the time of her fall. (*See* MSJ at 9 ("At the time of her injury, [Ms.] Sudre was a business invitee, as her presence at STIA was directly connected to the Port's business dealings at STIA.").)

Washington has adopted Sections 343 and 343A of the *Restatement (Second) of Torts* to define a possessor of land's duty to invitees. *Kamla v. Space Needle Corp.*, 52 P.3d 472, 477 (Wash. 2002). The *Restatement* provides that a possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land only if the possessor "(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger." *Id.* (quoting *Restatement (Second) of Torts* § 343). Additionally, "a possessor of land is not liable to his or her invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to [the invitees], unless the possessor should anticipate the harm despite such knowledge or obviousness." *Id.* (quoting *Restatement (Second) of Torts* § 343A (emphasis and brackets omitted)). "The comment to the *Restatement* explains that such anticipation may be found 'where the possessor has reason to expect that the invitee will proceed to encounter the known or

obvious danger because to a reasonable [person] in [that] position the advantages of doing so would outweigh the apparent risk.'" *Iwai v. State*, 915 P.2d 1089, 1093-94 (Wash. 1996) (quoting *Degel*, 914 P.2d at 731-32).

For a defendant to be liable to an invitee, the plaintiff must demonstrate that the landowner caused the unsafe condition or that "the landowner had actual or constructive knowledge of the unsafe condition."[6] *Iwai*, 915 P.2d at 1094, 1097. "Constructive notice arises where the condition 'has existed for such time as would have afforded [the possessor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.'" *Ingersoll v. DeBartolo, Inc.*, 869 P.2d 1014, 1015 (Wash. 1994) (quoting *Smith v. Manning's, Inc.*, 126 P.2d 44, 47 (Wash. 1942)); *see also Carlyle v. Safeway Stores, Inc.*, 896 P.2d 750, 752 (Wash. Ct. App. 1995). "The notice requirement insures liability attaches only to owners once they become or should have become aware of a dangerous situation." *Iwai*, 915 P.2d at 1095.

A possessor of land may be liable for the acts of its contractors that create unsafe conditions on the possessor's premises.[7] *See G.W. Blancher v. Bank of Cal.*, 286 P.2d 92, 94 (Wash. 1955); *Gildon v. Simon Prop. Grp., Inc.*, 145 P.3d 1196, 1203 (Wash. 2006) ("Liability is imposed on the possessor of land and one acting on behalf of the

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[6] Washington recognizes "two exceptions to the notice requirement in premises liability cases." *Iwai*, 915 P.2d at 1095. "Under the first exception, if a specific unsafe condition is foreseeably inherent in the nature of the business or mode of operation, plaintiffs need not prove notice for liability to be imposed." *Id.* (internal quotations omitted). "A second exception to the notice requirement also might apply . . . [i]f the landowner caused the hazardous condition . . . ." *Id.* at 1097. Plaintiffs rely on the second exception in their response to the motion for summary judgment. (MSJ Resp. at 10-11.)

[7] Defendants do not raise this issue. (*See generally* MSJ; MSJ Reply.)

possessor."); *Williamson v. Allied Grp., Inc.*, 72 P.3d 230, 233 (Wash. Ct. App. 2003) ("[T]he fact that the owner's duty is nondelegable does not relieve the contractor of the duty to assure that the site is safe for invitees while the work is being performed. Indeed, *Blancher* stands for [the proposition that] liability was properly attributed to contractors *as well as* to the owner.").

In the specific context of a slip and fall involving a wet floor, "Washington cases make it clear that the mere presence of water on a floor where the plaintiff slipped is not enough to prove negligence on the part of the owner or occupier of the building." *Kangley v. United States*, 788 F.2d 533, 534 (9th Cir. 1986) (citing Washington law). "[T]he plaintiff must prove that water makes the floor dangerously slippery and that the owner knew or should have known that water would make the floor slippery and that there was water on the floor at the time plaintiff slipped." *Id.*

b. Negligence by an Independent Contractor on a Premises Liability Theory

ABM is an independent contractor of the Port's, not the landowner or possessor of the premises where Ms. Sudre fell. (*See* Compl. ¶ 1.4; ABM Answer ¶ 1.4.) However, "applicable principles of premises liability impose upon the contractor the same duty as the landlord [or other possessor of land] with respect to a dangerous condition created on the land by the contractor's work." *Williamson*, 72 P.3d at 231; *but see Ingersoll*, 869 P.2d at 1017 (noting without deciding that ABM, which contracted with a shopping mall to perform janitorial services, may have been subject to a different duty than the

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landowner due to ABM's status as an independent contractor).[8] "A contractor's liability . . . is limited to harm caused by a condition created by the contractor." *Williamson*, 72 P.3d at 234.

c. Defendants' Arguments

In moving for summary judgment, Defendants argue that Plaintiffs have no evidence to prove actual or constructive notice of a dangerous condition at any of the three sites that the relevant witnesses testified Ms. Sudre fell. (MSJ at 11-13.) As to the site to which Ms. Sudre testified, Defendants contend that "even if one were to infer that some type of unknown substance was wiped from Mrs. Sudre's shoe, there is no evidence as to what this substance was, or for how long it had been, presumably, on the floor." (*Id.* at 11.) Defendants also argue that even if Ms. Sudre fell where her husband recalls her falling, there is no evidence that Defendants "knew or should have known of the existence of fluid at this location." (*Id.*) As to these two versions of events, Defendants argue that "there is no evidence that the Defendants had a reasonable opportunity to learn of its existence or to thereafter remove the substance from the floor." (*Id.* at 11-12.) Finally, Defendants argue that under Defendants' employees' version of events, Mr. Aguilar observed the spill that looked like a mocha, cleaned it up, put a wet floor sign over the spill, and waited by the spill with his cart. (*Id.* at 12.) Under this scenario,

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[8] Defendants assert in their motion for summary judgment that ABM owed a different duty of care to Ms. Sudre because ABM is an independent contractor. (*See* MSJ at 10.) Defendants cite no other case than *Ingersoll*, however, to support their position. (*Id.*) Accordingly, the court is unpersuaded that ABM owed a different duty of care than the Port based on the authority discussed above. (*Id.*)

Defendants contend that Ms. Sudre saw the cone but "nevertheless walked into the area where the cone, the maintenance cart, and Mr. Aguilar and Mr. Lisk were located and then slipped and fell." (*Id.*) For these reasons, Defendants contend that they cannot be liable for Ms. Sudre's fall under any of these three scenarios because they did not have actual or constructive knowledge of an unsafe condition.

d. Plaintiffs' Arguments

In response, Plaintiffs counter that they do not need to establish notice because there is sufficient evidence that Defendants created the unsafe condition.[9] (MSJ Resp. at 10-11.) Plaintiffs assert that "a reasonable jury could very well determine, on the preponderance of the evidence that [Ms. Sudre] slipped and fell on a floor that had been recently mopped by Mr. Aguilar and that Mr. Aguilar had failed to barricade" the spill. (*Id.* at 13 (capitalization omitted).) Plaintiffs argue specifically that this conclusion is supported by Mr. Sudre's observation that the floor looked like it had recently been mopped, the Sudres' testimony that a maintenance man apologized after Ms. Sudre's fall, the Sudres' testimony that Ms. Sudre "remained at a distance from the cone" as she exited the walkway, and the size of the wet area that Mr. Sudre observed. (*Id.* at 12.) Plaintiffs also argue that even if they must establish notice, "a reasonable jury could still

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[9] Defendants state in passing that Plaintiffs have "created a totally imaginary version of the slip and fall location to fit [their] new theory of the case that the Defendants created the hazard where [Ms.] Sudre fell." (MSJ Reply at 6.) Although it is true that a district court does not err when it refuses to entertain a new theory of liability raised for the first time at the summary judgment stage, *see Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1291-92 (9th Cir. 2000), Plaintiffs' complaint contains factual allegations related to Defendants causing the dangerous floor condition (*see* Compl. ¶¶ 3.4, 3.8). Further, if Defendants intended to make this argument, they have not adequately briefed it.

conclude that Mr. Aguilar had been negligent in not detecting a spill in the immediate or close vicinity of where he was working." (*Id.* at 13.) In addition, Plaintiffs contend that "due to the fact that Defendants have a wholly inadequate system in place for detecting spills, a reasonable jury could infer constructive notice and negligence on the part of Defendant ABM." (*Id.*)

e. The Court's Ruling

The court must construe all reasonable inferences in the light most favorable to Plaintiffs. *See Scott*, 550 U.S. at 380. Under this standard, the court concludes that Plaintiffs have presented sufficient evidence to withstand summary judgment on the theory that Defendants caused the unsafe condition, such that Defendants' actual or constructive knowledge is irrelevant.[10] *See Iwai*, 915 P.2d at 1097 (stating that a plaintiff may prove negligence on a premises liability theory by proving that the possessor of the land caused the unsafe condition). Even if Plaintiffs' evidence is less than robust, it

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[10] As the court discussed above, ABM owed Ms. Sudre a duty of care as an invitee. *See supra* § III.B.2.6; *Williamson*, 72 P.3d at 231. Thus, the court's analysis applies to both the Port and ABM. However, even if Defendants were correct that ABM's duty is distinct from the Port's because ABM was an independent contractor, Defendants nevertheless addressed ABM's duty only in terms of whether ABM was on notice of the unsafe condition. (*See* MSJ at 11 ("[T]here is no evidence that the Defendants could have had actual or constructive knowledge of such a hazard because there is no evidence that a hazard actually existed at [the location at which Ms. Sudre testified she fell]."), 12 ("[I]f a jury were to believe that [Ms.] Sudre fell where her husband recalls she fell, there is no evidence that Mr. Aguilar knew or should have known of the existence of fluid at this location."). Further, Plaintiffs have produced evidence from ABM's operations manager, George Perkins, about many aspects of how ABM must meet its standard of care, including how to barricade the clean-up of spills, how to adequately warn of a wet floor, and that areas surrounding a spill must also be checked and cleaned up. (*See* MSJ Resp. at 7 (citing Perkins Dep. (Dkt. # 43) at 12:20-22, 14:3-6, 15:1-19, 24:5-25:3.) Accordingly, Defendants do not meet their burden of showing that Plaintiffs lack evidence to show that ABM breached its duty or by producing their own evidence to negate an essential element of Plaintiffs' case. *See Nissan Fire*, 210 F.3d at 1106.

amounts to more than a "mere . . . scintilla of evidence." *Anderson*, 477 U.S. at 252. Specifically, Mr. Sudre observed that the floor looked like it had recently been mopped and the wet area was approximately one meter by one meter. (M. Sudre Dep. at 34:23-35:3, 31:19-23, 32:17-19; Sudre Decl. ¶¶ 11-12.) In addition, the Sudres testified that the maintenance man wiped Ms. Sudre's shoes, which both Plaintiffs testified were wet (E. Sudre Dep. at 34:16-18, 1416-17; M. Sudre Dep. at 31:19-23, 32:17-19 (The area was "wet around my wife, around her shoes.")) and about Ms. Sudre's path and distance from the cone as she exited the walkway (E. Sudre Dep. at 10:18-11:19; M. Sudre Dep. at 30:13-21). In addition, Mr. Aguilar was cleaning in the general location where Mr. Sudre testified Ms. Sudre fell, which provides further evidence from which a jury could find that Defendants caused the dangerous condition.[11] (Aguilar Dep. at 68.) On these facts, a jury could reasonably conclude that Ms. Sudre slipped and fell because of an unsafe condition that Defendants created.[12] The credibility of the testimony or the weight of the evidence is not for the court to decide on this motion for summary judgment and are considerations properly directed to the jury. *See Anderson*, 477 U.S. at 249-50.

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[11] The court further notes that in their reply in support of their motion to exclude Plaintiffs' expert William Martin, Defendants argue that even if Ms. Sudre fell at the site identified by Mr. Sudre, "the spill could have been caused by a passenger, who cleaned it up before Mr. Aguilar and Mr. Lisk arrived at the location." (Defs.' Mot. to Excl. Reply at 5.) While this inference may be permissible, the court is not to weigh the evidence or decide between multiple reasonable inferences at this stage. *See Anderson*, 477 U.S. at 249-50.

[12] The court does not take into account Mr. Sudre's testimony that a maintenance man apologized after Ms. Sudre's fall (*see* M. Sudre Dep. at 37:5-11; Sudre Decl. ¶¶ 14-15) because the court has not yet ruled on the admissibility of that testimony, *supra* § III.A.4. Thus, even without the testimony, there is sufficient evidence on this theory to withstand summary judgment.

In addition, although Defendants note that a plaintiff seeking to prove negligence from a wet floor in a premises liability case must prove that the floor was unreasonably dangerous when wet (*see* MSJ at 8-9; MSJ Reply at 4); *Kangley*, 788 F.2d at 534, Defendants do not argue that Plaintiffs cannot prove the floor was unreasonably dangerous nor do they present their own evidence to show that the floor was not unreasonably dangerous when wet in the manner Mr. Sudre described (*see* MSJ at 8-13).[13] Finally, the court notes that Defendants have not argued specifically on summary judgment that if Ms. Sudre encountered a danger that was known or obvious to her, Defendants should not have anticipated the harm even in the face of such knowledge or obviousness. (*See generally* MSJ; MSJ Reply at 5 ("Under the Defendants' version [of events], . . . [Ms.] Sudre walked right into this open and obvious[,] warned[-]about area and slipped and fell."); *see Kamla*, 52 P.3d at 477. For these reasons, Defendants have not met their burden of demonstrating that no genuine disputes of material fact exist as to whether Defendants created the unsafe condition.

However, no genuine dispute of material facts exists as to whether Defendants had actual or constructive notice of an unsafe condition caused by someone other than Defendants. Defendants sufficiently point to a lack of evidence to support a finding that an unsafe condition had existed for an adequate length of time such that Defendants

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[13] Defendants bring a motion to exclude Plaintiffs' expert William Martin, who opines as to the unreasonably dangerous nature of the floor at STIA when wet. (*See* Defs.' MTE); *infra* § III.D.1. Although it is not clear to the court that Plaintiffs would be able to prove that the floor—if wet—was unreasonably dangerous without Mr. Martin's testimony, Defendants have not raised that issue in their motion for summary judgment. (*See generally* MSJ.)

should have known about it in exercising due care. (*See* MSJ at 3-6 (discussing the lack of any evidence in Mr. Sudre's, Ms. Sudre's, Mr. Aguilar's, and Mr. Lisk's deposition testimony regarding the length of time the moisture had been present); MSJ Reply at 4-5 (same); E. Sudre Dep. at 13:5-11, 21:14-19; M. Sudre Dep. at 36:11-23.) Plaintiffs point only to evidence demonstrating that Defendants' system for detecting spills "was wholly inadequate" (*see* MSJ Resp. at 13 (citing Perkins Dep. at 24:5-25:3)) and from there rely on speculative argument to support their position, *Nelson*, 83 F.3d at 1081-82 (stating that "mere allegation" does not create a factual dispute); *Estrella v. Brandt*, 682 F.2d 814, 819-20 (9th Cir. 1982) ("Legal memoranda . . . are not evidence . . . ."). [14] Even if this evidence were sufficient to demonstrate that there is a genuine dispute as to whether Defendants' system is adequate, Plaintiffs do not present any evidence that a spill had existed for a sufficient length of time such that Defendants should have become aware of it during a reasonable inspection. (*See* MSJ Resp. at 13); *Schmidt v. Coogan*, 173 P.3d 273, 275 (Wash. 2007) ("Whether a defective condition existed long enough so that it should have reasonably been discovered" is part of the inquiry into whether the defendant had knowledge of the condition.); *Iwai*, 915 P.2d at 1095 ("Plaintiffs carry the burden of showing the specific unsafe condition had existed for such time as would have afforded [the defendant] sufficient opportunity . . . to have made a proper inspection of the

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[14] In their reply, Defendants assert that "[u]nder one of [Plaintiffs'] counsel's imaginary versions of the slip and fall, counsel speculates that the moisture observed by Mr. Sudre was the result of the tracking of moisture from some unknown location to the spot where Mr. Sudre says Mrs. Sudre fell and that Mr. Aguilar was negligent in not detecting the tracked moisture at the location of Mrs. Sudre's fall." (MSJ Reply at 4.)

premises . . . ."). The absence of any evidence to establish this fact is fatal to Plaintiffs' ability to prove negligence based on this theory.[15]

f. Plaintiffs' Request for Summary Judgment

Finally, Plaintiffs request that the court "dispose of [Defendants'] meritless defense as to liability *sua sponte*." (MSJ Resp. at 14.) The court assumes that Plaintiffs seek summary judgment on Defendants' affirmative defense that Ms. Sudre's own negligence contributed to her fall and injuries. (*Id.* ("Defendants [cannot] deny that the wet[,] shiny marble floor was dangerous since it was not open and obvious."); Port Answer at ¶ 6.2; ABM Answer ¶ 6.2.) The court denies Plaintiffs' request for several reasons.

First, the request is improper because, although Plaintiffs fashion the request as one for the court to grant summary judgment *sua sponte*, Plaintiffs are in reality moving for summary judgment. (*See* MSJ Reply at 8-9.) Local Civil Rule 7(k) directs "[a] party filing a cross motion [for summary judgment to] note it in accordance with the local rules," Local Rules W.D. Wash. LCR 7(k), and the court's scheduling order set the dispositive motions deadline in this case for October 11, 2016 (Sched. Order (Dkt. # 23) at 1). Plaintiffs did not follow these rules, instead embedding their motion for summary judgment in their response brief, which they filed on October 31, 2016. (*See* MSJ Resp. at 14.)

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[15] Plaintiffs do not argue that Defendants had "actual notice" of the unsafe condition, and the court does not address that theory of liability. (*See* MSJ Resp.)

Second, the court finds that Plaintiffs have not shown that Defendants lack evidence to show that Ms. Sudre was contributorily negligent or produced their own evidence to negate an essential element of Defendants' defense. (*See id.*); *Nissan Fire*, 210 F.3d at 1106.

Finally, the court has authority to *sua sponte* grant summary judgment in Plaintiffs' favor "only [if] the losing party has reasonable notice that the sufficiency of his or her claim [or defense] will be in issue." *Norse v. City of Santa Cruz*, 629 F.3d 966, 971-72 (9th Cir. 2010) (internal quotations omitted). The court finds that Defendants would not have "reasonable notice" that their contributory negligence defense was in question, even if the court were persuaded to enter summary judgment in Plaintiffs' favor. For these reasons, the court declines Plaintiffs' request.

C. Motion for Relief from Case Scheduling Order and Leave to Amend

1. Legal Standard

This motion is governed first by Federal Rule of Civil Procedure 16(b)(4). When the deadline for amending pleadings in the court's case scheduling order has passed, as is the case here (*see* Sched. Order at 1), a party may amend its pleadings only on a showing of "good cause" under Rule 16(b)(4), *Coleman*, 232 F.3d at 1294; *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992). A party seeking to amend a pleading after the date specified in the scheduling order must show "good cause" for amendment under Rule 16(b)(4). Fed. R. Civ. P. 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent."); *see Johnson*, 975 F.2d at 608. "Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the

amendment." *Johnson*, 975 F.2d at 609. To show "good cause" a party must show that it could not meet the deadline in the scheduling order despite the party's diligence. *Id*.

If a party shows "good cause," it must then demonstrate that the amendment is proper under Federal Rule of Civil Procedure 15. *See id.* at 608; *MMMT Holdings Corp. v. NSGI Holdings, Inc.*, No. C12-1570RSL, 2014 WL 2573290, at *2 (W.D. Wash. June 9, 2014). Rule 15(a)(2) requires the court to "freely give" leave to amend a pleading "when justice so requires." Fed. R. Civ. P. 15(a)(2). This policy is "applied with extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001); *see also DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987); *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981).

To assess the propriety of a motion for leave to amend, the court employs five factors: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether the party has previously amended its pleading. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) (citing *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989)); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). "[P]rejudice to the opposing party . . . carries the greatest weight." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). The burden is on the party opposing amendment to demonstrate that it will be prejudiced by an amendment. *DCD Programs, Ltd.*, 833 F.2d at 187.

2. Motion for Relief from Case Scheduling Order and to Amend Answer

Defendants seek to amend their answers to add an affirmative defense "to allow them to pursue a non-party at fault defense against [Ms.] Sudre's French physician, Dr.

Lehreitani." (MTA at 1.) Defendants contend there is good cause to allow them to amend their answers and that amendment is proper under Federal Rule of Civil Procedure 15. (*Id.* at 8-9.)

a. Good Cause Under Rule 16

The court finds that Defendants have good cause for seeking amendment after the May 11, 2016, deadline in the court's scheduling order. (*See* Sched. Order at 1.) The record before the court indicates that the parties worked diligently to complete discovery, particularly discovery related to Ms. Sudre's subsequent medical treatment. (Markette Decl. ISO MTA at 2-5.) The parties' respective medical experts physically examined Ms. Sudre in June 2016, and Defendants received Ms. Sudre's full medical file by late August 2016. (*Id.* at 5; Boone Decl. (Dkt. # 48) at 1).) Defendants' expert, Dr. Christopher Boone, then examined Ms. Sudre's medical file and updated his opinions on August 31, 2016, nearly two weeks before the close of discovery. (*See* Boone Decl. at 5; Sched. Order at 1.) In his update, Dr. Boone opined that Dr. Lehreitani had failed to comply with applicable medical standards of care. (*See* Boone Decl. at 5.) Plaintiffs' argument that Defendants cannot demonstrate good cause because they "did not complete discovery on time" is simply incorrect. (*Compare* MTA Resp. (Dkt. # 49) at 4 *with* Sched. Order at 1.) Based on these facts, the court concludes that Defendants could not have met the case scheduling order's deadline to amend their answers, despite the parties' diligence.

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b. Propriety of Amendment Under Rule 15

The court grants Defendants leave to amend their answers because amendment would not prejudice Plaintiffs, undue delay alone does not justify denying leave to amend, amendment would not necessarily be futile, there is no evidence that Defendants have acted in bad faith, and Defendants have not previously amended their answers. *See Eminence Capital*, 316 F.3d at 1052. Defendants have not complied with Local Civil Rule 15, however, and the court orders Defendants to do so before the court will accept Defendants' amended answers as set forth below. *See* Local Rules W.D. Wash. LCR 15 (requiring "[a] party who moves for leave to amend a pleading" to "attach a copy of the proposed amended pleading as an exhibit to the motion . . . .").

i. Prejudice

Prejudice means "undue difficulty in prosecuting a lawsuit as a result of a change in tactics or theories on the part of the other party." *Wizards of the Coast LLC v. Cryptozoic Entm't LLC*, 309 F.R.D. 645, 652 (W.D. Wash. 2015). Plaintiffs contend that allowing Defendants to add this affirmative defense would require the court to reopen discovery, which would delay the proceedings and prejudice Plaintiffs. (MTA Resp. at 10.) Specifically, Plaintiffs assert that "[o]btaining [Dr. Lehreitani's] testimony prior to the trial date would prove impossible." (*Id.*; Capp Decl. in Opp. to MTA ¶ 10.) Plaintiffs also argue that they would be prejudiced because it is unclear what choice of law would apply if the court allows the proposed amendment and it may be impossible to join Dr. Lehreitani as a party. (MTA Resp. at 10.) Defendants in turn argue there is no prejudice because Plaintiffs' expert opined in his September 1, 2016, deposition that Dr. Lehreitani

did not commit malpractice in his treatment of Ms. Sudre. (MTA Reply (Dkt. # 52) at 3.) In addition, Defendants contend that "[t]o invoke RCW 4.22.070's allocation of fault, there is no requirement the plaintiff be able to sue, to join, or to collect damages from the non-party at fault." (*Id.* at 2-3.)

The court concludes that Plaintiffs have not met their burden of demonstrating amendment would prejudice them, even at this stage in the proceedings. Plaintiffs give no reason why Dr. Lehreitani's testimony is necessary when the medical experts the parties have already retained have opined on whether Dr. Lehreitani provided negligent care. (*See generally* MTA Resp.; Boone Decl. at 5.) Once Dr. Boone supplemented his expert report—as he was required to do pursuant to Federal Rule of Civil Procedure 26(e) and did before the discovery cut-off on September 12, 2016—to include his opinions as to Dr. Lehreitani's standard of care, Plaintiffs' medical expert was entitled to rebut those opinions within 30 days. *See* Fed. R. Civ. P. 26(a)(2)(D)(ii). Plaintiffs could have moved the court to extend the discovery deadline for the limited purpose of securing their expert's rebuttal opinions if this timeline posed problems, but Plaintiffs did not. (*See* Dkt.) In addition, Plaintiffs' counsel deposed Dr. Boone on September 1, 2016, and therefore had the opportunity to probe Dr. Boone's opinions as to Dr. Lehreitani's care. (*See* Boone Dep. (Dkt. # 29).)

Further, Dr. Lehreitani does not need to be joined as a party, *see Kielkopf v. United States*, No. C05-5831FDB, 2007 WL 765209, at *2 (W.D. Wash. 2007) (citing *Geurin v. Winston Indus., Inc.*, 316 F.3d 879, 884 (9th Cir. 2002)), and it is not clear that Dr. Lehreitani's testimony could be obtained because he is beyond the court's subpoena

power, *see* Fed. R. Civ. P. 45(c)(1)(A). For these reasons, the court concludes that Plaintiffs have not met their burden of showing that amendment would prejudice them. *See DCD Programs, Ltd.*, 833 F.2d at 187.

ii. Undue Delay

Although Defendants delayed in seeking the court's leave to amend, undue delay alone is insufficient to deny leave to amend. *Webb*, 665 F.2d at 980. Defendants first decided to seek leave to amend their answers on August 31, 2016, the day Dr. Boone provided his supplemental opinions after reviewing Ms. Sudre's entire file. (*See* Capp Decl. in Opp. to MTA ¶¶ 4-5, Ex. A (attaching Defendants' counsel's email stating, "[w]e intend to file a motion to amend our answer to assert a non-party at fault defense based upon Dr. Lehreitani's malpractice in treating your client.").) Despite making this decision on August 31, 2016, Defendants did not properly seek the court's leave to amend[16] until October 13, 2016, less than two months before trial, a month after the close of discovery, and two days after filing a motion for summary judgment and the dispositive motions deadline. (*See generally* Sched. Order; MSJ.) Defendants' delay therefore may have been undue, but this fact alone does not warrant denying amendment.

iii. Futility

A proposed amendment is futile "if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff–Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988); *accord*

[16] Defendants first moved to amend their answers on September 21, 2016. (Dkt. # 24). Defendants withdrew that motion, however, on October 6, 2016. (Dkt. # 30.)

Atkins, 2011 WL 1335607, at *4. "Denial of leave to amend [because of futility] is rare." *Netbula, LLC v. Distinct Corp*., 212 F.R.D. 534, 539 (N.D. Cal. 2003); *see also Green Valley Corp. v. Caldo Oil Co.*, No. 09–CV–04028–LHK, 2011 WL 1465883, at *6 (N.D. Cal. Apr. 18, 2011) (noting "the general preference against denying a motion for leave to amend based on futility"). Plaintiffs argue that the motion to amend is futile because "Washington law clearly establishes that a tortfeasor who is responsible for another person's bodily injury is also responsible for any harmful or negligent medical treatment of injuries caused by the tortfeasor's negligent conduct." (MTA Resp. at 7 (citing *Lindquist v. Dengel*, 595 P.2d 934 (Wash. 1979)).) Accordingly, Plaintiffs argue that RCW 4.22.070, which directs "the trier of fact [to] determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages," RCW 4.22.070(1), does not modify the causation element. (*Id.* at 7.)

Washington law encompasses both the original tortfeasor rule embodied in *Lindquist* and allocation of fault for non-parties under the state's comparative negligence statute. *See Lindquist*, 595 P.2d at 936-37; RCW 4.22.070. The court in *Lindquist* adopted the *Restatement (Second) of Torts* § 457 rule that "'[i]f the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.'" *Lindquist*, 595 P.2d at 936-37 (quoting *Restatement (Second) of Torts* § 457). In addition, Washington law generally permits "any party to a proceeding [to] assert that another person is at fault." *Wuth ex rel. Kessler v. Lab. Corp. of Am.*, 359

P.3d 841, 862 (Wash. Ct. App. 2015) (internal quotation omitted); *see also* RCW 4.22.070. Further, "a defendant is entitled to shepherd evidence and attempt to prove that the 'empty chairs' in a lawsuit are the proximate cause of the injuries alleged," *Kielkopf*, 2007 WL 765209, at *2 (citing *Geurin*, 316 F.3d at 884), but if an entity's conduct is not a proximate cause of an injury, fault cannot be allocated to that entity, RCW 4.22.015. As the Washington Court of Appeals noted in 1996, RCW 4.22.070 did not "abrogate[] the common law *Lindquist* rule."[17] *Henderson v. Tyrrell*, 910 P.2d 522, 542 n.17 (Wash. Ct. App. 1996). The Washington Court of Appeals did not, however, address whether both rules may be invoked regarding subsequent medical malpractice. *See id.*

The parties appear to agree that Washington's comparative negligence regime does not abrogate the common law rule embodied in *Lindquist*. (MTA Resp. at 7; MTA Reply at 3.) What the parties disagree on is whether Defendants may assert a non-party at-fault affirmative defense given that *Lindquist* remains good law. (*See* MTA Reply at 3.) Although Washington courts have not substantively addressed this issue, other state courts have. Those courts have held that both the *Restatement (Second) of Torts* § 457—the rule adopted in *Lindquist*—and the state's comparative fault rules can be invoked in the same case. *See, e.g.*, *Banks v. Elks Club Pride of Tenn.*, 301 S.W.3d 214, 224 (Tenn.

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[17] In making this statement, the Washington Court of Appeals expressed disagreement with a decision from the District Court for the Eastern District of Washington, *Workman v. Chinchinian*, 807 F. Supp. 634, 643 (E.D. Wash. 1992), upon which Defendants rely. (*See* MTA.) In that case, the District Court allowed "evidence of negligence by subsequent practitioners" at trial because it was "relevant and admissible" to the case in light of Washington's adoption of comparative fault. *Id.* The District Court made no comment, however, on whether *Lindquist* remained good law after Washington enacted its comparative fault statute. *See id.*

2010); *Cramer v. Slater*, 204 P.3d 508, 514 (Idaho 1009). For example, the Tennessee Supreme Court concluded that the court's later adoption of a comparative negligence rule did not "prevent the continuing imposition of liability on an original tortfeasor for subsequent negligent medical care for the injuries caused by the original tortfeasor." *Banks*, 301 S.W.3d at 224 (collecting cases). Similarly, the Supreme Court of Idaho concluded that "because Idaho has adopted comparative fault, the *Restatement (Second) of Torts* § 457 operates as a general foreseeability rule for any subsequent medical negligence and does not impute liability arising from all subsequent negligent acts onto the original negligent actor." *Cramer*, 204 P.3d at 514. Based on the foregoing authority and the unsettled nature of the application of *Lindquist* and comparative fault principles under Washington law, the court concludes that Defendants' proposed amendment is not futile.[18]

The court also denies Plaintiffs' request to strike Dr. Boone's second and third declarations. (*See* MTA Surreply (Dkt. # 62).) Dr. Boone's second declaration clarifies his deposition testimony, which Dr. Boone is permitted to do. (*Compare* 2d Boone Decl. (Dkt. # 53) *with* Boone Decl.); *Van Asdale*, 577 F.3d at 999 (A party "is not precluded from elaborating upon, explaining[,] or clarifying prior testimony elicited by opposing counsel on deposition.") The declaration is dated October 6, 2016, just over a month

[18] At trial, Plaintiffs may again argue that Defendants are not entitled to submit this issue to the jury by moving for judgment as a matter of law as to this defense and "specify[ing] the judgment sought and the law and facts that entitle the movant to the judgment." Fed. R. Civ. P. 50(a)(2). That standard, however, is distinct from the futility standard upon which the court must decide whether to allow Defendants to amend their answers to assert this defense.

after Dr. Boone's deposition on September 1, 2016. (*See* 2d Boone Decl.) Plaintiffs have not argued that Dr. Boone made these clarifications over 30 days after receiving his deposition transcript, so the court has no basis on which to find that the declaration constitutes an untimely correction under Federal Rule of Civil Procedure 30(e)(1). (*See generally* MTA Resp.; MTA Surreply); Fed. R. Civ. P. 30(e)(1). Dr. Boone's third declaration appears to have been prepared in support of Defendants' instant motion to clarify which standard of care Dr. Boone asserts that Dr. Lehreitani failed to meet. (*See* 3d Boone Decl. (Dkt. # 54).) Although the declaration would be untimely under the court's scheduling order if the declaration contained new opinions, Plaintiffs have not made this argument. (*See generally* MTA Surreply.) Finally, Dr. Boone's declarations are made on personal knowledge because Dr. Boone is serving as an expert medical witness in this case and states that he personally examined Ms. Sudre and her medical file. (*See* MTA Surreply at 2; 2d Boone Decl.; 3d Boone Decl.); *Bellah*, 623 F. Supp. 2d at 1186.

The court further determines that Plaintiffs' request to strike Dr. Boone's second and third declarations appears to be a late attempt to exclude portions of Dr. Boone's testimony. This late attempt to challenge the expert testimony comes after the court's deadline for challenging expert testimony, however, and is therefore improper. (*See* Sched. Order at 1 (setting deadline for challenging expert testimony on October 11, 2016).) It is possible that allowing Defendants to add an affirmative defense premised on a nonparty's medical malpractice, which requires expert testimony, after the deadline for challenging expert witness testimony could in some way prejudice Plaintiffs. However,

Plaintiffs do not make this argument (*see generally* MTA Resp.), and the court concludes that Plaintiffs have waived it, *see, e.g.*, *Shakur v. Schriro*, 514 F.3d 878, 892 (9th Cir. 2008).

iv. Bad Faith and Previous Amendments

There is no indication that Defendants act in bad faith in seeking this amendment, and Defendants have not previously amended their answers. (*See generally* MTA; MTA Resp.; Dkt.) Accordingly, these factors do not affect the court's decision.

c. Amendment Contingent on Compliance with Local Civil Rule 15

Finally, the court notes that Defendants fail to comply with Local Civil Rule 15, which requires "[a] party who moves for leave to amend a pleading . . . [to] attach a copy of the proposed amended pleading as an exhibit to the motion . . . ." Local Rules W. D. Wash. LCR 15; *see also Robertson v. GMAC Mortg. LLC*, No. C12-2017MJP, 2013 WL 2278109, at *1 (W.D. Wash. May 23, 2013) ("The Court denies the motion [to amend] because Plaintiff fails to comply with LCR 15."); *Young v. Quality Loan Serv. Corp.*, No. C14-1713RSL, 2015 WL 12559901, at *1 (W.D. Wash. July 7, 2015) (denying leave to amend pleading in part because the plaintiff had not "provided a copy of the proposed amended pleading for the Court's review as required by LCR 15"); *Veracruz v. Hendrix*, No. C14-6029BHS, 2015 WL 5840065, at *2 (W.D. Wash. Oct. 7, 2015) (denying leave to amend in part because the party seeking amendment had failed to comply with LCR 15); *Ejonga-Deogracias v. Dep't of Corr.*, No. C15-5784RJB-KLS, 2016 WL 3180289, at *1 (W.D. Wash. May 17, 2016) (stating that court had denied amendment without prejudice for failure to comply with LCR 15). Local Civil Rule 15 further instructs that

"[t]he party must indicate on the proposed amended pleading how it differs from the pleading that it amends by bracketing or striking through the text to be deleted and underlining or highlighting the text to be added." *Id.* Defendants attached no such exhibit with their motion to amend. (*See generally* MTA; Dkt.) The court therefore conditions its grant of Defendants' motion to amend their answers on Defendants' proper submission to the court of their proposed amended answers. Should Defendants attempt to alter their answers in any way beyond asserting the non-party at fault affirmative defense they address in their motion, the court will not permit Defendants to file their amended answers. Defendants must file their proposed amended answers on the docket no later than Friday, December 9, 2016, at 12:00 p.m. Failure to timely do so will result in the court precluding Defendants from amending their answers.

D. Motions to Exclude Expert Testimony

1. Legal Standard

A court has broad discretion to admit expert testimony if it meets the requirements of Federal Rule of Evidence 702. *See United States v. Murillo*, 255 F.3d 1169, 1178 (9th Cir. 2001) (noting the court's broad discretion to assess the relevance and reliability of expert testimony); Fed. R. Evid. 702. Under Rule 702, a witness who "is qualified as an expert by knowledge, skill, experience, training, or education" may testify as an expert if: (1) "the expert's . . . specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"; (2) "the testimony is based on sufficient facts or data"; (3) "the testimony is the product of reliable principles and methods"; and (4) the witness "has reliably applied the principles and methods to the facts of the case." Fed. R.

Evid. 702. The district court must "perform a gatekeeping function to ensure that the expert's proffered testimony is both reliable and relevant."[19] *United States v. Christian*, 749 F.3d 806, 810 (9th Cir. 2014) (internal quotation omitted). "Relevancy simply requires that '[t]he evidence . . . logically advance a material aspect of the party's case.'" *Estate of Barabin v. Astenjohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014) (quoting *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007)). Reliability requires the court to assess "whether an expert's testimony has 'a reliable basis in the knowledge and experience of the relevant discipline.'" *Id.* (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999) (citation and alterations omitted)). The party seeking to admit the expert testimony bears the burden of proving that it is admissible. *See Medvedeva v. City of Kirkland*, C14-0007RSL, 2015 WL 11233199, at *1 (W.D. Wash. May 18, 2015).

The Supreme Court has suggested several factors that courts can use in determining reliability: (1) whether a theory or technique can be tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential error rate of the theory or technique; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific community. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-94 (1993). The reliability inquiry is flexible, however, and trial judges have broad latitude to focus on the considerations relevant to a particular case. *Kumho Tire*, 526 U.S. at 150. For example, where the expert's testimony is "based

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[19] Pretrial *Daubert* hearings are not required for the court to perform its gatekeeper role because "[t]he trial judge . . . has broad latitude in determining the appropriate form of the inquiry." *Estate of Barabin*, 740 P.3d at 463.

on some 'other specialized knowledge,'" "[t]he *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable" because the reliability of this kind of testimony "depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." *United States v. Hankey*, 203 F.3d 1160, 1168-69 (9th Cir. 2000). In these instances, the court examines "the expert's relevant knowledge and experience to determine if he may testify." *Hassebrock v. Air & Liquid Sys. Corp.*, C14-1835RSM, 2016 WL 4496917, at *2 (W.D. Wash. Apr. 11, 2016). In determining reliability, the court must rule not on the correctness of the expert's conclusions but on the soundness of the methodology, *Estate of Barabin*, 740 F.3d at 463 (citing *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010)), and the analytical connection between the data, the methodology, and the expert's conclusions, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *see also* Fed. R. Evid. 702 advisory committee's notes to 2000 amendments ("[T]he testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case.").

In addition to the foregoing requirements, an expert witness may not give an opinion on his "*legal conclusion*, i.e., an opinion on an ultimate issue of law." *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004) (internal quotations omitted). Further, "instructing the jury as to the applicable law is the distinct and exclusive province of the court." *Id.* (internal quotations omitted).

2. Defendants' Motion to Exclude William Martin's Testimony

Plaintiffs retained Mr. Martin "to determine if the walking surface [at STIA] was dangerous in a manner that caused Ms. Sudre's fall and injuries." (Northcraft Decl. ISO

Defs.' MTE (Dkt. # 34) ¶ 1, pp. 6-19 ("Martin Rep.") at 5.) Mr. Martin offers four opinions:

> (1) the floor where Ms. Sudre fell "was far more slippery when wet [than] when dry, and was dangerous in a manner that caused Ms. Sudre's fall and injuries"; (2) Defendants' "failure to barricade or otherwise reliably warn passengers of the foreseeable condition of a dangerously slippery walking surface caused Ms. Sudre's fall and injuries; (3) "[t]hrough their failure to comply with the standards of care for walkway safety," Defendants "allowed a dangerous walkway condition to exist and caused Ms. Sudre's fall and injuries; and (4) ABM "violated the standards of care for premises safety" through its "failure to barricade or warn of the dangerous condition until it was made safe."

(*Id.* at 8.) Defendants contend that these four opinions encompass two broad categories: (1) that the floor at STIA was dangerously slippery when wet, and (2) that the Port and ABM's policies, practices, and procedures to inspect, detect, and clean up spills were inadequate. (Defs.' MTE at 3-4.) The court likewise addresses Mr. Martin's opinions in this manner. In doing so, the court concludes that Mr. Martin may testify as to the nature of the floor at STIA when wet, but not as to the sufficiency of Defendants' policies and practices for the reasons set forth below.

a. Nature of the Floor When Wet

Defendants have not contested Mr. Martin's qualifications or the relevance or reliability of his testimony as to his first opinion. (*See generally* Defs. MTE.) However, in its gatekeeper role, the court must determine whether Mr. Martin's testimony is admissible as expert testimony. *Christian*, 749 F.3d at 810. The court first finds that Mr. Martin is qualified to give expert testimony on the slip resistance of the floor at STIA based on his knowledge, training, and education. *See* Fed. R. Evid. 702. Mr. Martin is a

licensed architect with a Bachelor of Arts degree in architecture from Yale University and a Masters of Architecture from the University of Washington. (Martin Rep. at 5.) He has "expertise and experience analyzing floor safety and [has] training in accurately measuring the slip resistance of floor surfaces." (*Id.*) Further, Mr. Martin is a "CXLT Tribometrist," which is a "slip resistance metering certified operator," and is also "a member of organizations that develop national standards for flooring and walkway safety." (*Id.*) Mr. Martin's testimony will also help the jury to understand a fact in issue—whether the floor at STIA was dangerous when wet as Plaintiffs contend the floor was at the time Ms. Sudre fell. *See supra* § III.B; Fed. R. Evid. 702.

Mr. Martin's testimony as to this subject is relevant and reliable. *See* Fed. R. Evid. 702(c)-(d); *Estate of Barabin*, 740 F.3d at 463. First, Mr. Martin's testimony is relevant because Plaintiffs must establish that the floor at STIA was dangerously slippery when wet. *See Kangley*, 788 F.2d at 534; *Estate of Barabin*, 740 F.3d at 463 (stating that relevancy requires the evidence to logically advance a material part of the case). Second, Mr. Martin's report and deposition demonstrate that he used a reliable method for measuring slip resistance and reliably applied it in this case. Mr. Martin testified that he conducted a slip test to determine whether the floor at three locations near where Ms. Sudre fell became dangerously slippery when wet. (Northcraft Decl. ISO Defs.' MTE ¶ 2, pp. 20-150 ("Martin Dep.") at 47:3; Martin Rep. at 7.) He used an English XL Variable Incidence Tribometer in accordance with the requirements of ASTM F2508 to conduct his test. (Martin Dep. at 47:3; Martin Rep. at 7.) Multiple courts have concluded that expert testimony based on the use of such tribometers to measure the slip resistance

of floors is reliable. *Michaels v. Taco Bell Corp.*, Civ. No. 10-1051-AC, 2012 WL 4507953, at *1-*2, *4 (D. Or. Sept. 27, 2012) (concluding that proffered expert's expert testimony based on using a tribometer to conduct slip-resistance testing was reliable); *Feuerstein v. Home Depot, U.S.A., Inc.*, No. 2:12-cv-01062 JWS, 2014 WL 2616582, at *2-*3 (D. Ariz. June 12, 2014) (same); *Steffen v. Home Depot U.S.A., Inc.*, No. CV-13-199-JLQ, 2014 WL 1494108, at *6-*7 (E.D. Wash. Apr. 16, 2014) (same).

Mr. Martin further establishes that he has reliably applied this methodology to this case by pointing out that a widely used measure of slip resistance establishes that a slip resistance of 0.5 or higher is generally considered safe. (Martin Rep. at 7.) During his tests, Mr. Martin found that the three locations had an average slip resistance index of between 0.25 and 0.26 when he added water to the floor.[20] (*Id.*) Further, Mr. Martin's method is corroborated by Defendants' own witness, ABM's George Perkins, who testified that "[a]nything below 0.5 is too slippery." (*See* Martin Rep. at 9 (citing Perkins Dep.)).

Now that the court has determined Mr. Martin's testimony is relevant and reliable, the court turns to Defendants' argument that this testimony contravenes Washington law. Defendants argue that Mr. Martin's testimony "advocates that the Defendants are liable where there is moisture on the floor and the slip resistance coefficient falls below .5." (Defs.' MTE at 11.) In contrast, they argue, Washington law "makes it clear that the

[20] This finding appears to be consistent with Defendants' expert's test of the wet floor using an English XL Variable Incidence Tribometer. (*See* Capp. Decl. ISO Pls.' MTE (Dkt. #37-1) ¶ 2, Ex. G ("Black Rep.") at 68.)

mere presence of water on a floor where the plaintiff slipped is not enough to prove negligence on the part of the owner or occupier of the building." (*Id.* (citing *Kangley*, 788 F.2d at 534).) Although Defendants are correct that under Washington law, "the plaintiff must prove that water makes the floor dangerously slippery and that the owner knew or should have known both that water would make the floor slippery and that there was water on the floor at the time the plaintiff slipped," *Kangley*, 788 F.2d at 534, Defendants are incorrect in asserting that Mr. Martin's testimony as to the point at which the floor at STIA becomes dangerously slippery requires Mr. Martin to opine on the amount of time that the water had been present on the floor.[21] (*See* Defs.' MTE at 11 ("To [Mr. Martin], it does not matter whether a spill existed for 30 seconds prior to a fall as the possessor of land or janitorial company should have cleaned it up regardless.").) Although it is the court's province to instruct the jury, Mr. Martin's opinion that the floor at STIA is unsafe when wet is not contrary to Washington law. Accordingly, the court denies Defendants' motion to exclude this testimony.

b. Standard of Care for Policies and Procedures

Defendants next argue that Mr. Martin's testimony about the policies and procedures Defendants should have employed to maintain reasonably safe premises should be excluded because it is unreliable and improperly instructs the jury as to what result it should reach. (*See id.* at 9.) Specifically, Defendants argue that Mr. Martin does not have knowledge of the relevant "standard of care applicable to this case." (*Id.*)

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[21] *See supra* § III.B.

Because he does not have such knowledge, Defendants argue that Mr. Martin's opinions about the inadequacy of Defendants' practices are unreliable. (*Id.*) The court agrees that Plaintiffs have not met their burden of demonstrating that Mr. Martin's testimony on this subject "'has a reliable basis in the knowledge and experience of the relevant discipline.'" *Estate of Barabin*, 740 F.3d at 463 (quoting *Kumho Tire*, 526 U.S. at 149).

For these non-scientific opinions, the court evaluates whether Mr. Martin's experience or knowledge qualify him to testify as an expert. *See Hankey*, 203 F.3d at 1168-69. Plaintiffs have not demonstrated that Mr. Martin has the necessary expertise to testify on this topic.[22] As discussed above, Mr. Martin's resume indicates that he is an architect with expertise in floor safety and that his education "included the study of physics, material properties, selection of materials for use in floor surfaces, relevant codes and standards, and human factors related to the use of buildings." (Martin Rep. at 5.) But Mr. Martin does not indicate that he has knowledge of or experience with the relevant standard of care for policies and practices to maintain safe floors or how janitorial services should be carried out to maintain floor safety. (*See id.* at 12.)

In addition, Mr. Martin's report contains little reasoning to demonstrate that his opinions concerning policies and practices are reliable. Plaintiffs state that Mr. Martin's opinions on the standard of care Defendants should have applied through their practices

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[22] The court is not required to scour the record to determine if there are facts that support either party's position. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 978 F. Supp. 2d 1053, 1093 n.66 (C.D. Cal. 2013) (noting that the party "failed to cite to evidence of record") (citing *Orr*, 285 F. 3d at 774-75); *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, No. 2:06-CV-06229 FMC, 2009 WL 7464165, at *2 (C.D. Cal. Feb. 18, 2009)). Rather, the parties are expected to bring to the court's attention relevant facts.

and procedures are "that the floor must be kept in a safe condition" and "the system [for keeping the floor safe] should be effective." (Defs.' MTE Resp. (Dkt. # 64) at 5.) To form his opinions, Mr. Martin read ABM's employee training manual, an ABM document on effective barricading, and deposition testimony from Mr. Perkins and Mr. Lisk. (Martin Rep. at 5-6.) He also "[s]lip tested the floor" and "researched the standards of care that were applicable." (Martin Dep. at 15:16-17.) However, in translating this information to an opinion on Defendants' policies, Mr. Martin conflates the floor's slipperiness with the adequacy of Defendants' policies. Mr. Martin opines in a conclusory fashion that Defendants' practices are inadequate based solely on the fact that the floor was allegedly wet in this instance.

For example, relying only on Ms. Sudre's testimony about where her fall occurred, Mr. Martin concludes that Defendants "failed to execute the measures testified to by [Mr.] Lisk and [Mr.] Perkins." (Martin Rep. at 7.) Mr. Martin also testified that Defendants "don't appear to have a reliable way to find [spills] . . . [a]nd if they did find [a spill], then they didn't clean it up properly." (Martin Dep. 78:6-9.) He further testified that "the standard of care [is] that the floor requires a high level of maintenance because it is slippery when it's wet." (*Id.* at 105:10-13.) Mr. Martin also stated repeatedly in his deposition that he was not opining on the adequacy of Defendants' practices and policies for locating and cleaning up spills, although that is exactly what he does in his report. (*Compare* Martin Dep. at 101:13-25, 112:11-113:12, 119:12-121:22, 123:11-125:20, 126:2-12 *with* Martin Rep. at 8.) These bald assertions do not demonstrate that Mr.

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Martin has adequate knowledge or experience to opine on whether Defendants had adequate practices and policies.

Mr. Martin also cites three publications as bases for his knowledge in forming these opinions: (1) the Port Authority of New York and New Jersey's Pedestrian Falling Accidents in Transit Terminals, (2) the National Safety Council's Data Sheet 495, Slips, Trips, and Falls on Floors, and (3) ANSI's A1264.2 Provision of Slip Resistance on Walking, Working Surfaces. (Martin Rep. at 6-7.) He does not explain, however, whether professionals in the field rely on these publications in formulating opinions as to the appropriate standard of care. (*See generally id.*) In addition, Plaintiffs do not cite any opinions of other experts or any cases where federal courts have accepted a similar basis for these types of opinions. (*See* Defs.' MTE Resp.) Accordingly, Mr. Martin's opinions about Defendants' practices are not "the product of reliable principles and methods" nor has Mr. Martin "reliably applied the principles and methods to the facts" of this case. Fed. R. Evid. 702(c), (d).

The court highlights that its exclusion of Mr. Martin's testimony as to the standard of care does not necessarily preclude this case from proceeding to trial. "[A] legal claim is governed by the substantive law of the state in which the federal court sits, [so] the federal court must look to state law with respect to the issue of whether expert witness testimony is required to substantiate a claim that an individual deviated from the standard of care applicable to his conduct." *Looman v. Mont.*, No. CV 11-143-M-DWM-JCL, 2013 WL 587344, at *1 n.1 (D. Mont. Jan. 31, 2013) (citing *Hutchinson v. United States*, 838 F.2d 390, 392 (9th Cir. 1988)). Under Washington law, a professional duty of care

must be established by expert testimony because the standards of a particular professional community are generally outside of a layperson's experience. *See Morton v. McFall*, 115 P.3d 1023, 1027 (Wash. Ct. App. 2005). However, "[e]xpert testimony is unnecessary where the acts in question are within the common knowledge or experience of lay persons." *Nedeau v. Armstrong*, No. CV-09-0189-EFS, 2011 WL 849744, at *4 (E.D. Wash. Mar. 8, 2011). In *Nedeau*, for example, the court determined that expert testimony was not required in a case involving "a recreational bicycle tour organization" because the court was "unable to find . . . any authority [under Washington law] applying the professional negligence standard outside the context of investment advising, health care, law, engineering, real estate, accounting, insurance, and the like." *Id.* Defendants have not argued that the standard of care governing janitorial services at STIA is not within a lay person's knowledge, and the court has not located any authority to the contrary.

In sum, the court concludes that Mr. Martin may testify as an expert as to the nature of the floors at STIA when they become wet, but excludes Mr. Martin's testimony about the Defendants' policies and practices for detecting and cleaning up spills. In addition, Mr. Martin may not testify as to his legal conclusions or otherwise instruct the jury on the law applicable in this case. *See Hangarter*, 373 F.3d at 1016.

3. Plaintiffs' Motion to Exclude Alan Black's Testimony

Defendants offer Mr. Black as an expert on engineering and human factors. (*See generally* Pls.' MTE Resp. (Dkt. # 56).) Mr. Black offers six opinions, the first two

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of which Plaintiffs do not contest.[23] (Pls.' MTE at 7.) However, Plaintiffs seek to exclude Mr. Black's testimony on four opinions that relate to Defendants' policies and procedures, the shoes Ms. Sudre wore at the time of her fall, and the psychological phenomenon of inattentional blindness. (*Id.*) Mr. Black is a professional engineer and has over 30 years of engineering and safety experience. (Black Rep. at 47.) He has a Bachelor of Science degree in Mechanical Engineering from San Jose State University and a Master of Science in Operations Research from Stanford University. (*Id.*) Mr. Black has also taken a continuing education course in Principles of Behavioral Neuroscience, Psychological Statistics, Abnormal Psychology, and Developmental Psychology at UCLA. (*Id.* at 48.) Mr. Black has "extensive experience with theme park development and attractions safety programs including risk analysis and hazard mitigation." (*Id.* at 75.)

a. Improper Supplementation of Mr. Black's Report

Defendants acknowledge in their response that Mr. Black supplemented his expert report in July 2016 and disclosed the supplemental report to Plaintiffs on July 18, 2016, well after the court's case scheduling order directed the parties to disclose their expert witnesses and opinions on May 11, 2016. (Pls.' MTE Resp. at 10; *see also* Sched. Order

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[23] Mr. Black's first two opinions are: (1) "[t]o a reasonable degree of engineering certainty, the material used in the construction of the floor is commonly used for the type of facility in question and is reasonably slip resistant for the application," and (2) "[t]o a reasonable degree of engineering and human factors certainty, it is more probably true than not true that the [Port] did not allow the flooring material to deteriorate so as to cause [Ms.] Sudre's accident." (Black Rep. at 9-10.) Because Plaintiffs do not challenge these opinions, the court makes no determination at this time as to whether these opinions are relevant and reliable as *Daubert* requires and will take up the issue at the pretrial conference on January 4, 2017. (*See* Sched. Order at 2.)

at 1.) Defendants contend that Mr. Black supplemented his report after the deadline because on May 13, 2016, Defendants received Mr. Sudre's deposition transcript, which depicted "a distinctly different version of events than either [Ms.] Sudre or Mr. Lisk and Mr. Aguilar as to where [Ms.] Sudre fell at STIA." (Pls.' MTE Resp. at 10.) Defendants also state that they received interrogatory responses regarding Ms. Sudre's shoes on May 13, 2016. (*Id.*) Defendants request that the court find Mr. Black's July 2016 supplementation justified and harmless. (*See id.* at 11.)

An expert must supplement his report "if the party learns that in some material respect the disclosure is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(a)(2)(3), (e)(1)(A). "The supplementation requirement of Rule 26(e)(1) is not intended, however, to permit parties to add new opinions to an expert report based on evidence that was available to them at the time the initial expert report was due." *Obesity Research Inst., LLC v. Fiber Research Int'l, LLC*, Case No. 15-cv-0595-BAS-MDD, 2016 WL 3167327, at *1 (S.D. Cal. June 7, 2016) (internal quotation marks omitted). "[A] supplemental expert report that states additional opinions or seeks to strengthen or deepen opinions expressed in the original expert report is beyond the scope of proper supplementation and subject to exclusion under [Federal Rule of Civil Procedure] 37(c)." *Plumley v. Mockett*, 836 F. Supp. 2d 1053, 1062 (C.D. Cal. 2010). "The party who fails [to comply with the supplementation requirements] bears the burden of showing substantial justification for such failure or that its failure to

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disclose was harmless." *Obesity Research*, 2016 WL 3167327, at *2 (internal quotations omitted).

The court concludes that Mr. Black's supplemental report was not improper. Mr. Black updated his opinions to take into account Mr. Sudre's testimony about how and where Ms. Sudre fell, which he could not have done prior to the May 11, 2016, expert disclosure deadline. (Sched. Order at 1.) Mr. Black's updated opinions based on Mr. Sudre's testimony, therefore, appear to be within Rule 26's requirement that an expert supplement his report "if the party learns that in some material respect the disclosure is incomplete or incorrect" based on information the expert did not previously have. Fed. R. Civ. P. 26(a)(2)(3), (e)(1)(A). In addition, Mr. Black had already opined in his initial report that Ms. Sudre's shoes had contributed to her fall, and Mr. Black updated his report after conducting additional site testing based on Plaintiffs' interrogatory responses.

However, even if Mr. Black improperly supplemented his opinions, the supplementation was harmless. Defendants made Mr. Black's updated report available to Plaintiffs before Mr. Black's deposition, and Plaintiffs provided the report to Mr. Martin for critique. (*See* Pls.' MTE Resp. at 12.) For these reasons, the court finds that, if Mr. Black's supplementation were improper, it was nevertheless harmless because Plaintiffs had ample opportunity to test Mr. Black's updated opinions.

b. Policies and Procedures

Mr. Black intends to testify that (1) "[t]o a reasonable degree of engineering and human factors certainty, the [Port] and ABM procedures and time periods established for the inspection of Concourse A were reasonable for inspection of such public areas for slip

and fall hazards," and (2) "[i]f it is assumed that [Ms.] Sudre fell in one or the other of the two locations indicated by her and her husband as the location of the fall, and assuming there was a contaminant involved in her fall, it is more probably true than not true that ABM personnel had not yet detected the existence of such a contaminant within the inspection time period established by ABM for detecting such potential slip and fall hazards on Concourse A and thus, did not have reasonable notice thereof nor an opportunity to remove the contaminant." (Black Rep. at 10-12.) Plaintiffs argue that Mr. Black's opinions as to Defendants' policies and procedures do not reasonably rely on the facts and data in this case (Pls.' MTE at 4-5, 7-9) and are unreliable because he "fails to identify any scientific or technical bases for his opinions" (*id.* at 9).

In its gatekeeper role, the court first takes up the issue of whether Mr. Black's opinions as to Defendants' policies and procedures are reliable. Mr. Black's report notes that his basis for the first opinion is that "[i]n addition to the cleanup response to tenant reported spills, ABM has a policy to discover and remove any unreported contamination," which consists of three ABM attendants patrolling the concourse each hour. (Black Rep. at 10.) Mr. Black's second opinion on this topic relies on this same basis, along with further explanation of Defendants' policies and practices as Mr. Perkins described in his deposition. (*See* Black Rep. at 11-12.) Despite reaching these opinions, Mr. Black's report provides no explanation of why Defendants' policies are acceptable based on his experience, his knowledge, or industry standard. (*See generally* Black Rep.) Instead, Mr. Black simply states what the policies are and then reaches his conclusions. Mr. Black's bare recitations of Defendants' policies, however, are insufficient to establish

that his opinions are reliable. "If admissibility could be established merely by the *ipse dixit* [*i.e.*, the "say so"] of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong." *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004) (en banc).

In his deposition, Mr. Black stated that he based these opinions on his knowledge of a grocery store's need to respond to a spill every 15, 20, or 25 minutes" (Black Dep. 33:1-7) and on his 18 years "designing and building theme parks worldwide" (*id.* at 33:16-17). Mr. Black stated that these two experiences are "probably it" in forming the basis of his knowledge and experience for these opinions. (*Id.* at 34:4-7.) Defendants do not explain why Mr. Black's experience with and knowledge of grocery store and theme park procedures qualifies him to testify as to the procedures employed at an airport. (*See* Pls.' MTE Resp. at 4-7.) In addition, as to Mr. Black's opinion that "ABM personnel had not yet detected the existence of such a contaminant within the inspection time period established by ABM for detecting such potential slip and fall hazards on Concourse A and thus, did not have reasonable notice thereof nor an opportunity to remove the contaminant," Mr. Black does not explain why the procedures that ABM employed meant that a contaminant would not have been discovered before Ms. Sudre's fall. (*See* Black Rep. at 11-12.) Instead, Defendants rely on unsupported inferences. (*See id.*) For these reasons, Defendants have not shown that Mr. Black's testimony is reliable, and

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accordingly, the court excludes Mr. Black's opinions as to Defendants' practices and policies.[24]

c. Ms. Sudre's Shoes

Plaintiffs further argue that Mr. Black's opinion that Ms. Sudre's high heel shoes contributed to her slip and fall is unhelpful to the jury because it is "pure, basic commonsense," that addresses a matter within a layperson's common knowledge. (Pls.' MTE at 5-6 (citing Black Dep. 44:19-45:19).) Defendants argue that "Mr. Black's testimony regarding Mrs. Sudre's heel height is more than common sense, because it quantifies the effect of heel height on the utilized coefficient of friction and increased the likelihood she would slip." (Pls.' MTE Resp. at 7-8.)

However, although Plaintiffs do not contest Mr. Black's opinion on this ground, the court finds that Defendants have provided insufficient evidence to establish that Mr. Black's opinion is based on a reliable methodology and reliably applied to the facts of this case. Mr. Black explained in his report that he tested the slip resistance of the floor in the three possible fall locations using an English XL Variable Incidence Tribometer (in much the same manner as Mr. Martin), and compared the heel height of Ms. Sudre's shoe to findings in a single study, which states that heel height can significantly impact the coefficient of friction. (*Id.* at 14-15.) Although Mr. Black is a professional engineer (*id.* at 21), Mr. Black cannot rely on his credentials alone to testify as an expert on this topic,

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[24] Because the court excludes as unreliable Mr. Black's opinions on Defendants' policies and procedures, the court does not address Plaintiffs' other arguments for excluding this testimony.

see Frazier, 387 F.3d at 1261. Mr. Black does not discuss whether the study he cites is generally accepted in the field, whether it was subjected to peer review, or the potential error rate of introducing heel height into an assessment of the coefficient of friction. (*See generally id.*) Neither Mr. Black nor Defendants cite any federal case in which this kind of testimony was admissible, and the court has not located any such case. (*See generally id.*; Pls.' MTE.) Accordingly, the court cannot conclude that Mr. Black's methodology is reliable and has been reliably applied to the facts of this case to form this opinion. For this reason, the court excludes Mr. Black's opinion as to Ms. Sudre's shoes.

d. "Inattentional Blindness"

Finally, Plaintiffs argue that Mr. Black's testimony about inattentional blindness is unreliable and that Mr. Black does not qualify as an expert to testify about this subject. (Pls.' MTE at 10-12.) Defendants counter that "[t]he bases for Mr. Black's opinion are the Plaintiffs' testimony, Mr. Lisk's testimony, Mr. Aguilar's testimony, and Mr. Black's education and experience regarding inattentional blindness, and several studies involving inattentional blindness." (Pls.' MTE Resp. at 8.)

Mr. Black states that Ms. Sudre demonstrated inattentional blindness when she "[n]otic[ed] and underst[ood] the meaning of the safety cone, according to [her own] testimony, yet fail[ed]to notice the presence of two men and a comparatively large janitorial cart." (Black Rep. at 20.) Defendants state that "[i]nattentional blindness is part of human factors or psychology, involving what characteristics of human behavior are being elicited to cause an accident." (Pls.' MTE Resp. at 9.) In his report, Mr. Black relies on only one citation—a website for the Noba Project—as a basis for his

understanding of inattentional blindness. (Black Rep. at 20 n.14.) The qualifications Mr. Black outlines in his report indicate that he took a continuing education course in "Principles of Behavioral Neuroscience, Psychological Statistics, Abnormal Psychology, and Development Psychology" (*id.* at 22), which Defendants argue qualifies him to "describe how the human brain processes information and determines what information to pay attention [to]" (Pls.' MTE Resp. at 9).

In his deposition, Mr. Black referenced two studies regarding this psychological phenomenon, which Mr. Black then provided to Plaintiffs in a supplemental expert witness disclosure. (*See id.* at 9; Black Dep. at 69:20-74:13; Markette Decl. in Opp. to Pls.' MTE (Dkt. # 57) ¶¶ 3-4.) Defendants invite the court to "see the three additional articles accompanying" their response to further probe "the existence of" inattentional blindness. (Pls.' MTE Resp. at 10.) The court first notes that it does not appear that Mr. Black actually relied on these studies in forming his opinion because he does not list or discuss them in his expert report. (*See generally* Black Rep.) In any event, although the studies appear to be peer reviewed and may even describe a generally accepted principle in the field of psychology, Defendants have failed to demonstrate that Mr. Black has the requisite qualifications to give an opinion based on inattentional blindness. Mr. Black's foremost experience is as a professional engineer with degrees in Mechanical Engineering and Operations Research. (Black Rep. at 21.) Although he has attended a continuing education course in psychology, he does not state how taking this one course qualifies him as an expert in this area or what area of psychology he specifically studied. (*See* Black Rep. at 21-28; Capp Decl. ISO Pls.' MTE at 84 (providing the supplemental

background Mr. Black provided to Plaintiffs to demonstrate Mr. Black's qualification as an expert on this topic).) The other experiences he cites include designing attractions at theme parks, training pilots, taking theater and drama courses in high school, and working at a telephone crisis intervention center in high school (Capp Decl. ISO Pls.' MTE at 84), none of which the court finds qualify him to testify as an expert about inattentional blindness, *see, e.g.*, *Davies v. City of Lakewood*, No. 14-cv-01285-RBJ, 2016 WL 614434, at *10-11 (D. Colo. Feb. 16, 2016) (finding that former law enforcement officers were unqualified to opine on inattentional blindness). Accordingly, the court finds that Defendants have not met their burden on demonstrating that Mr. Black's opinion on inattentional blindness is admissible.

Based on the foregoing analysis, the court excludes Mr. Black's testimony on inattentional blindness because Defendants have failed to meet their burden of demonstrating that the testimony is admissible under Federal Rule of Evidence 702. *See* Fed. R. Evid. 702.

E. Motion for Sanctions

1. Legal Standard

Spoliation occurs when a party "destroys or alters material evidence or fails to preserve" evidence when the party is under a duty to preserve it. *Apple Inc. v. Samsung Elec. Co., Ltd.*, 888 F. Supp. 2d 976, 989 (N.D. Cal. 2012). A party has a duty to preserve evidence "when litigation is pending or reasonably anticipated." *Moore v. Lowe's Home Ctrs., LLC*, No. C14-1459RJB, 2016 WL 3458353, at *3 (W.D. Wash. June 24, 2016). "[T]rial courts in [the Ninth] Circuit generally agree that, '[a]s soon as a

potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.'" *Apple*, 888 F. Supp. 2d at 991. "Circuit courts describe the duty to preserve evidence as attaching when a party should know that evidence may be relevant to litigation that is anticipated, or reasonably foreseeable." *PacifiCorp v. Nw. Pipeline GP*, 879 F. Supp. 2d 1171, 1188 (D. Or. 2012) (internal quotation marks omitted).

If a party had a duty to preserve evidence and did not, "the court considers the prejudice suffered by the non-spoliator and the level of culpability of the spoliator, including the spoliator's motive or degree of fault." *Moore*, 2016 WL 3458353, *3. "A party's destruction of evidence qualifies as willful spoliation if the party has 'some notice that the documents were *potentially* relevant to the litigation before they were destroyed.'" *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) (quoting *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002)). "There are two sources of authority under which a district court can sanction a party who has despoiled evidence: the inherent power of federal courts to levy sanctions in response to abusive litigation practices, and the availability of sanctions under [Federal Rule of Civil Procedure] 37 against a party who fails to obey an order to provide or permit discovery." *Id.* at 958.

2. Plaintiffs' Motion

Plaintiffs argue that Defendants willfully destroyed video surveillance evidence that documented Ms. Sudre's slip and fall at STIA. (MFS at 1.) Plaintiffs contend that "[a]round November 8, 2014" Defendants were "on notice to preserve any video footage

of the incident." (*Id.* at 6 (citing Capp Decl. ISO MFS (Dkt. # 37) ¶ 4); *see also id.* ¶ 5 (attaching email from Mr. Capp on November 11, 2014, requesting that Defendants preserve any video of Ms. Sudre's fall).) Plaintiffs also argue that Defendants were on notice of litigation immediately following Ms. Sudre's fall because they investigated her fall, prepared a "general liability report," and took pictures of the shoes she was wearing. (MFS Reply at 1, 4.) Plaintiffs contend that the Port's Paul Pelton, the airport duty manager, testified that "[t]he primary purpose of the investigation is not to promote safety but to document what happens and for risk management purposes." (MFS at 4 (citing Pelton Dep. (Dkt. # 42) at 9:1-10:18).) Plaintiffs further argue that Defendants never attempted to locate the video because "they believed that the case was so clear-cut." (*Id.* at 6.)

Mr. Pelton investigated the accident. (MFS Resp. (Dkt. # 58) at 2 (citing Pelton Dep. at 7:7-9, 12:17-19).) On the day Ms. Sudre fell, Mr. Pelton did not look to see if video of the fall had been captured because he thought that Ms. Sudre had "walked through the area where Mr. Lisk and Mr. Aguilar were standing and fell near the cone." (*Id.* (citing Pelton Dep. at 224-23:18, 27:20-28:3, 28:17-22).) Defendants contend that they "could not have reasonably anticipated litigation when their investigations revealed [Ms.] Sudre walked into a wet area, which was covered by a cone, and the ABM attendant had followed proper cleaning and barricading procedures." (*Id.* at 6.)

Dave Richardson, Defendants' Federal Rule of Civil Procedure 30(b)(6) designee, testified that, although possible, it was unlikely that the surveillance cameras at STIA would have recorded the area where Ms. Sudre fell. (*See id.* at 3 (citing Richardson Dep.

(Dkt. # 44) at 15:6-10, 23:21-24:3).) Mr. Richardson also testified that the Port retains surveillance footage for between three and 30 days, and that any footage taken near where Ms. Sudre fell would have been retained for 30 days. (*Id.* at 24:13-25:25, 26:7-28:2.) The day after receiving Mr. Capp's November 11, 2014, email, Mr. Richardson looked for video, but determined that if any had existed, it had been destroyed according to normal business procedures within 30 days after the incident. (Northcraft Decl. in Opp. to MFS at 1 (attaching email from Mr. Richardson indicating he had looked for the video).) Accordingly, Defendants argue that they did not spoil evidence because "the video footage was destroyed prior to the Defendants having notice of the possibility of litigation, and the video footage was overwritten—destroyed—in compliance with the video retention policy at STIA."[25] (MFS Resp. at 5.) Because Defendants had a policy that called for retaining the video surveillance for the area where Ms. Sudre for only 30 days, Defendants state that "[a]ny video would have been overwritten on or around October 22, 2014." (*Id.*)

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[25] Defendants further state that Plaintiffs spoiled evidence because they left Ms. Sudre's "shoes at the Rehabilitation Center, where she stayed from October 2014 to January 2015, and the Center threw them away." (MFS Resp. at 9 (citing Northcraft Decl. in Opp. to MFS at 9).) Defendants state that Mr. Capp first reached out to Defendants in November 2014, so at the time that Ms. Sudre's shoes were thrown away, "Plaintiffs already knew the slip and fall may lead to litigation." (*Id.*) As a result of the shoes being thrown away, Defendants contend that they "were deprived the possibility of evaluating the structural integrity of the shoes and determining whether [their] wear and tear affected Mrs. Sudre's tendency to slip." (*Id.*) Accordingly, Defendants argue that they are entitled to a negative inference similar to their expert Alan Black's opinion that Ms. Sudre's shoes caused or contributed to her fall. (*Id.*) The court concludes that this issue has not been fully briefed and accordingly denies the request without prejudice to re-raising the issue in an appropriate filing.

The court agrees that Defendants did not willfully spoil evidence. Defendants were first on notice of potential litigation when Mr. Capp emailed them on November 11, 2014. (*See* Capp Decl. ISO MFS, Ex. A); *Perez v. U.S. Postal Serv.*, No. C12-0315RSM, 2014 WL 10726125, at *3 (W.D. Wash. July 30, 2014) ("Letters threatening or providing notice of potential litigation can trigger the duty to preserve."). Although Defendants investigated Ms. Sudre's fall immediately after it occurred and documented that investigation, the court concludes that those actions alone are insufficient to demonstrate that Defendants anticipated litigation on September 22, 2014, the day of Ms. Sudre's fall. *See Kitsap Physicians Serv.*, 314 F.3d at 1001 (holding that no duty to preserve arose from an internal investigation that resulted in "an opinion from outside legal counsel that there were no bases for fraud"); *Putscher v. Smith's Food & Drug Ctrs., Inc.*, No. 2:13-CV-1509-GMN-VCF, 2014 WL 2835315, at *7 (D. Nev. June 20, 2014) (finding that "[s]tock language [about the report being prepared in anticipation of litigation and under the direction of legal counsel] on the bottom of a preprinted incident report" did not alone trigger a duty to preserve in a slip and fall case); *but see Stedeford v. Wal-Mart Stores, Inc.*, No. 2:14-cv-01429-JAD-PAL, 2016 WL 3462132, at *9 (D. Nev. June 24, 2016) (finding sanctions were warranted because a customer's report of her injury from a slip and fall in the store for which she intended to seek medical attention made litigation reasonably foreseeable). Despite Plaintiffs' characterizations, the Port conducted its investigation of Ms. Sudre's fall for several reasons, including to promote safety, to document what happened, and for risk management purposes. (Pelton Dep. at

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9:14-10:18.) Therefore, the investigation itself did not trigger a duty to preserve evidence.

In addition, "[w]here a party has a long-standing policy of destruction of documents on a regular schedule," like Mr. Richardson testifies the Port does, "destruction that occurs in line with the policy is relatively unlikely to be seen as spoliation." *Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1320 (9th Cir. 2011). Plaintiffs are simply incorrect in stating that Defendants never attempted to locate video until the spring of 2016, and that Defendants' failure to look for the video is evidence of willful or bad-faith destruction of evidence. (*See* Northcraft Decl. in Opp. to MFS ¶ 1, p. 2 (attaching Richardson email).) Emails that Defendants produced to Plaintiffs in discovery show that Mr. Richardson looked for the video on November 12, 2014, one day after Plaintiffs' counsel made the request. (*Id.*) For these reasons, Defendants did not have a duty to preserve evidence until Mr. Capp's November 11, 2014, letter informed Defendants that litigation was reasonably foreseeable, and the court denies Plaintiffs' motion.

IV. CONCLUSION

For the foregoing reasons, the court DENIES Defendants' motion for summary judgment (Dkt. # 31), GRANTS Defendants' motion for relief from the court's case scheduling order and for leave to amend their answers subject to Defendants filing their proposed amendments on the docket no later than Friday, December 9, 2016, at 12:00 p.m. and the court's approval of those proposed amendments (Dkt. # 46), GRANTS in part and DENIES in part Defendants' motion to exclude William Martin's testimony

(Dkt. # 33), GRANTS Plaintiffs' motion to exclude parts of Alan Black's testimony (Dkt. # 35), and DENIES Plaintiffs' motion for sanctions for spoliation of evidence (Dkt. # 36).

Dated this 2nd day of December, 2016.

JAMES L. ROBART
United States District Judge